LEGISLATIVE COUNCIL

PORTFOLIO COMMITTEE NO. 5

Anti-Discrimination Amendment (Complaint Handling) Bill 2020

Report 55

5

September 2020

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Portfolio Committee No. 5 - Legal Affairs

Anti-Discrimination Amendment (Complaint Handling) Bill 2020

Ordered to be printed 18 September 2020 according to Standing Order 231

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Council. Portfolio Committee No. 5 – Legal Affairs.

Anti-Discrimination Amendment (Complaint Handling) Bill 2020 / Portfolio Committee No. 5 – Legal Affairs [Sydney, N.S.W.] : the Committee, 2020. [x, 76] pages ; 30 cm. (Report no. 55 / Portfolio Committee No. 5 – Legal Affairs)

"September 2020"

Chair: Hon. Robert Borsak MLC.

ISBN 9781920788803

1. New South Wales. Parliament. Legislative Council—Anti-Discrimination Amendment (Complaint Handling) Bill 2020.
2. New South Wales. Anti-Discrimination Act 1977.
3. Discrimination—Law and legislation—New South Wales.
4. Complaints (Administrative procedure)—New South Wales.

I. Borsak, Robert.

II. Title.

III. Series: New South Wales. Parliament. Legislative Council. Portfolio Committee No. 5 – Legal Affairs. Report ; no. 55

346.944013 (DDC22)

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Terms of reference

That:

(a) the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 be referred to Portfolio Committee No. 5 – Legal Affairs for inquiry and report; and

(b) on tabling of the report by Portfolio Committee No. 5 – Legal Affairs, a motion may be moved without notice that the Bill be restored to the Notice Paper at the stage it had reached prior to referral.

The terms of reference were referred to the committee by the Legislative Council on Thursday 27 February 2020.[1]

[1] *Minutes*, NSW Legislative Council, 27 February 2020, p 821.

Committee details

Committee members

Hon Robert Borsak MLC	Shooters Fishers and Farmers Party	*Chair*
Mr David Shoebridge MLC	The Greens	*Deputy Chair*
Hon Mark Buttigieg MLC[2]	Australian Labor Party	
Hon Rose Jackson MLC	Australian Labor Party	
Hon Trevor Khan MLC[3]	The Nationals	
Hon Mark Latham MLC[4]	Pauline Hanson's One Nation	
Hon Natasha Maclaren-Jones MLC	Liberal Party	
Hon Natalie Ward MLC	Liberal Party	

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2 The Hon Mark Buttigieg MLC replaced the Hon Shaoquett Moselmane MLC as a member of the committee on 24 July 2020.

3 The Hon Trevor Khan MLC replaced the Hon Sam Farraway MLC as a member of the committee on 19 May 2020.

4 The Hon Mark Latham MLC was a participating member for the duration of the inquiry.

Chair's foreword

The Anti-Discrimination Amendment (Complaint Handling) Bill 2020 was referred to Portfolio Committee No. 5 – Legal Affairs for inquiry and report.

The Bill amends the *Anti-Discrimination Act 1977* to make further provision with respect to the declining of certain complaints by the President of the Anti-Discrimination Board and to remove the requirement for the President to refer certain declined complaints to the NSW Civil and Administrative Tribunal. In essence the amendments put forward in the Bill look to prevent the complaints process from being abused and the resources of the Anti-Discrimination Board taken up by vexatious complaints.

During the inquiry, the committee considered a number of concerns that were raised by stakeholders relating to the proposed amendments in the Bill, as well as broader issues with the Act. The committee notes that there were differing views from stakeholders on possible solutions. The committee members themselves also had differing views as to how to strike the right balance between access to justice and ensuring unmeritorious complaints are not accepted and pursued by the Anti-Discrimination Board.

In my view, there are individuals that are misusing the complaints process for personal vendetta's, with the President of the Anti-Discrimination Board lacking the powers to prevent this. Vexatious litigants are abusing the complaints process and in doing so are wasting tax payers resources unnecessarily.

I acknowledge that this is a complex area of law and a thorough review of the Act is needed and has been recommended by this committee. However, in my view, it is worthwhile making some amendments to the Act to ensure it is not being used for the wrong purposes.

With this in mind, the committee has made a number of recommendations that go beyond the provisions put forward in the Bill. These include strengthening the provisions in the Act to allow the President to decline complaints that are found to be frivolous, vexatious, misconceived or lacking in substance, on receipt of a complaint and during investigations. We have also recommended that the President of the Anti-Discrimination Board be given 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. The committee has also recommended that the NSW Government consider a number of other potential amendments to the Act to improve the complaints handling process.

On behalf of the committee, I would like to thank all who participated in the inquiry. I would also like to thank the secretariat for their assistance, and committee members for their considered contributions to this process.

Finally, I present the report to the House and call on members of the Legislative Council to consider the views of this committee and the stakeholders who provided evidence during this inquiry when the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 is brought forward for debate in the House.

Hon Robert Borsak MLC

Committee Chair

Recommendations

Recommendation 1 **26**

That sections 89B and 92 of the *Anti-Discrimination Act 1977* not be amended as proposed by the Anti-Discrimination Amendment (Complaint Handling) Bill 2020.

Recommendation 2 **26**

That the NSW Government consider amending sections 89B and 92 of the *Anti-Discrimination Act 1977* to*:*

- allow the President to 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 Act
- insert a new ground for refusal if the complaint falls within an exception to unlawful discrimination or vilification.

Recommendation 3 **27**

That the NSW Government amend the *Anti-Discrimination Act 1977* to provide the President of the Anti-Discrimination Board 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.

Recommendation 4 **27**

That the NSW Government consider amending section 89 of the *Anti-Discrimination Act 1977* to provide that the complainant must set out reasonable details of the alleged acts, omissions or practices.

Recommendation 5 **46**

That the NSW Government undertake a thorough review of the *Anti-Discrimination Act 1977* with the aim of updating and modernising the Act, in consultation with key stakeholders, and specifically addressing the committee comments and concerns identified by stakeholders as set out in this report.

Recommendation 6 **46**

That the NSW Government consider potential amendments to the *Anti-Discrimination Act 1977* to ensure that:

- 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
- 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).

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on Thursday 27 February 2020.

The committee received 190 submissions and two supplementary submissions. The committee also received 2070 pro-formas.

The committee held two public hearings, and one *in camera* hearing, at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.

Chapter 1 Overview

This chapter provides an overview of the Anti-Discrimination Amendment (Complaint Handling) Bill 2020.

Reference

1.1 The Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (the Bill) is a private members bill that was introduced in the Legislative Council on 27 February 2020 by the Hon Mark Latham MLC, member of Pauline Hanson's One Nation party.[5]

1.2 Mr Latham gave his second reading speech in the Legislative Council on 27 February 2020. Subsequently, Mr Latham moved a motion that the Bill be referred to Portfolio Committee No. 5 – Legal Affairs for inquiry and report. The motion was agreed to by the House.[6]

Background and purpose of the Bill

1.3 The Bill amends the *Anti-Discrimination Act 1977* (the Act) to provide clear and reasonable rules for the acceptance of complaints by the NSW Anti-Discrimination Board.[7]

1.4 The NSW Anti-Discrimination Board is an independent statutory body that consists of a President and four Board members. The current President of the Board is the Hon Dr Annabelle Bennett AC SC.[8] Anti-Discrimination NSW is a state government body that administers the Act on behalf of the President and the Board.[9]

1.5 The Act makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status and carer's responsibilities. The Act also makes it unlawful for vilification on the grounds of race, homosexuality, transgender status or HIV/AIDS status.[10]

1.6 In his second reading speech, Mr Latham suggests that the Act is at risk of being misused by political activists:

> The risk therefore with the Anti-Discrimination Act is one of misuse. If it is too legalistic, too open to vexatious complaints, it can be exploited by political activists for the wrong purpose. It can be used for personal feuds and political campaigns, rather than justice and the fair treatment of citizens.[11]

5 *Hansard,* NSW Legislative Council, 27 February 2020, pp 7-12 (Mark Latham).

6 *Hansard,* NSW Legislative Council, 27 February 2020, p 13 (Mark Latham).

7 Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, p 1.

8 Anti-Discrimination NSW, Anti-Discrimination Board of NSW (7 May 2020), <https://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_aboutus/adb1_president.aspx>

9 Submission 122, Anti-Discrimination NSW, p 1.

10 Submission 122, Anti-Discrimination NSW, p 1.

11 *Hansard,* NSW Legislative Council, 27 February 2020, p 7 (Mark Latham).

1.7 Mr Latham emphasised that the provisions in the Act are 'open to abuse' and argued that the current provisions of the Act are limited, including:

- the appeal process to the NSW Civil and Administrative Tribunal (NCAT) is 'a second bite of the cherry, eating up scarce resources in the New South Wales legal system at a time when court backlogs are long and getting longer'
- there is inconsistency in what can be reviewed by NCAT with 'a decision by the Anti-Discrimination Board to decline a complaint in whole or in part is not reviewable by the tribunal, yet a decision to discontinue an investigation is reviewable'
- complaints are lodged with the Anti-Discrimination Board at no cost and can be referred to NCAT as part of a no-cost jurisdiction, however penalties up to $100,000 can be issued by NCAT payable to the complainant, who can 'make a tidy profit', and this can result in lengthy and costly legal processes for respondents
- 'the threshold for the acceptance of complaints at the Anti-Discrimination Board is minimal', where complaints can be 'lodged in writing and they need not demonstrate a prima facie case'
- there is no requirement, as in other states, that the President 'must' decline complaints on matters that are:
  - more than 12 months old
  - outside the scope of the Act
  - where someone has falsely lodged a complaint on behalf of someone else
  - vilification cases where the person making the complaint does not have the characteristic allegedly being vilified.
- complaints can be lodged in New South Wales when the respondent resides in other states and the risk of 'forum shopping' due to the 'low threshold' in New South Wales.[12]

1.8 Mr Latham also provided a number of examples during his second reading speech of complaints lodged with the Anti-Discrimination Board that he argues 'would clearly be regarded as vexatious' and 'not what the founders of the Anti-Discrimination Act intended in the functions of the board'.[13]

1.9 Mr Latham advised that he therefore brought forward this Bill to make changes to the Act, stating that it will 'restore balance and fair, streamlined processes to the work of the Anti-Discrimination Board'. He noted that the Bill will modernise the Act and ensure complaints are administered appropriately:

> These reforms are long overdue. They modernise the Act. They bring it up to date in the age of social media. They allow the Anti-Discrimination Board of NSW and the NSW Civil and Administrative Tribunal to deal with crucial cases of discrimination and vilification without squandering resources on personal vendettas and political campaigns that have no place in this jurisdiction.[14]

12 *Hansard,* NSW Legislative Council, 27 February 2020, pp 8-9 (Mark Latham).

13 *Hansard,* NSW Legislative Council, 27 February 2020, p 9 (Mark Latham).

14 *Hansard,* NSW Legislative Council, 27 February 2020, pp 9 and 11-12 (Mark Latham).

Overview of the Bill's provisions

1.10 The object of the Bill, as set out in the explanatory note, is to amend the Act to 'make further provision with respect to the declining of certain complaints by the President of the Anti-Discrimination Board and to remove the requirement for the President to refer certain declined complaints to the NSW Civil and Administrative Tribunal'.[15]

1.11 The amendments proposed in the Bill under Schedule 1:

- omit section 88B of the Act which relates to the making of complaints in more than one jurisdiction
- provide that the President of the Anti-Discrimination Board must decline certain complaints made to the President, by omitting 'may' from section 89B(2) of the Act and inserting instead 'must'
- insert additional grounds on which the President 'must' decline a complaint made to the President, including where:
  - the President is of the opinion that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance
  - the President is of the opinion there is another more appropriate remedy that should be pursued in relation to the complaint or part of the complaint
  - the subject-matter of the complaint has been dealt with by the President, an authority of the State or the Commonwealth
  - the President is of the opinion that the subject-matter of the complaint may be more effectively or conveniently dealt with by an authority of the State or the Commonwealth
  - one or more of the respondents is an individual who has made a public statement to which the complaint relates and, at the time of making the statement, was a resident of another State or Territory, and unless otherwise established by the complainant, not in New South Wales
  - the complaint falls within an exception to the unlawful discrimination concerned
  - the respondent has a cognitive impairment and it is reasonably expected that the cognitive impairment was a significant contributing factor to the conduct that is the subject of the complaint
- clarify the matters the President is to consider before determining that a complaint is frivolous, vexatious, misconceived or lacking in substance, including:
  - the number of complaints lodged by the complainant, in respect of the same respondent and in respect of the same or similar conduct
  - if the complainant has lodged more than one complaint in respect of the same respondent – any similarity in the conduct that is the subject of the complaint
  - any evidence that the complainant is not acting in the interests of justice
- provide that the President must decline certain complaints during investigation, by omitting 'may' from section 92 and 92(1) of the Act and inserting instead 'must'

[15] Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, Explanatory Note, p 1.

- clarify the matters the President is to consider before being satisfied that a complaint is frivolous, vexatious, misconceived or lacking in substance for the purposes of declining the complaint at any stage of the President's investigation of a complaint
- omit section 92A, 93A, 95 and 96 of the Act that requires the President to refer certain declined complaints to the Civil and Administrative Tribunal at the request of the complainant
- provide that an amendment made to the Act by the Bill does not apply to a complaint that was made before the commencement of the Bill.[16]

16 Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, pp 3-5.

Chapter 2 Discretionary decision-making and vexatious complaints

This chapter considers two key issues relating to the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 – the removal of discretionary decision-making under section 89B and section 92 and the management of frivolous and vexatious complaints.

Discretionary decision-making

2.1 The Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (the Bill) amends section 89B and 92 of the *Anti-discrimination Act 1977* (the Act) to remove discretionary decision making in relation to the circumstances in which a complaint can be accepted or declined by the President of the Anti-Discrimination Board.

2.2 Section 89B, as it currently stands, states:

> **89B Acceptance or declining of complaints by the President**
>
> (1) The President is to determine whether or not a complaint made to the President is to be accepted or declined, in whole or in part.
>
> (2) The President may decline a complaint if—
>
> (a) no part of the conduct complained of could amount to a contravention of a provision of this Act or the regulations, or
>
> (b) the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint, or
>
> (c) the conduct complained of could amount to a contravention of a provision of this Act for which a specific penalty is imposed, or
>
> (d) in the case of a vilification complaint, it fails to satisfy the requirements of section 88, or
>
> (e) the President is not satisfied that the complaint was made by or on behalf of the complainant named in the complaint.
>
> (3) The President is to give notice of a decision to accept or decline a complaint to—
>
> (a) the person who made the complaint, and
>
> (b) if the respondent has been given notice of the complaint, the respondent, so far as is reasonably practicable, within 28 days after the decision is made.
>
> (4) A decision under this section to decline a complaint in whole or in part is not reviewable by the Tribunal.[17]

2.3 Section 92, as it currently stands, states:

> **92 President may decline complaint during investigation**
>
> (1) If at any stage of the President's investigation of a complaint—
>
> (a) the President is satisfied that—

[17] *Anti-Discrimination Act 1977,* s 89B.

(i) the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or

(ii) the conduct alleged, or part of the conduct alleged, if proven, would not disclose the contravention of a provision of this Act or the regulations, or

(iii) the nature of the conduct alleged is such that further action by the President in relation to the complaint, or any part of the complaint, is not warranted, or

(iv) another more appropriate remedy has been, is being, or should be, pursued in relation to the complaint or part of the complaint, or

(v) the subject-matter of the complaint has been, is being, or should be, dealt with by another person or body, or

(vi) the respondent has taken appropriate steps to remedy or redress the conduct, or part of the conduct, complained of, or

(vii) it is not in the public interest to take any further action in respect of the complaint or any part of the complaint, or

(b) the President is satisfied that for any other reason no further action should be taken in respect of the complaint, or part of the complaint, the President may, by notice in writing addressed to the complainant, decline the complaint or part of the complaint.

(2) The President, in a notice under this section, is to advise the complainant of—

(a) the reason for declining the complaint or part of the complaint, and

(b) the rights of the complainant under sections 93A and 96.[18]

2.4 The Bill proposes to remove the President's discretion to accept or decline a complaint in section 89B(2) by changing the wording from 'may' to 'must'.[19] It also proposes to insert at the end of section 89B(2)(e) a number of other grounds in which the President can accept or decline a complaint, including where the President is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.

2.5 In terms of section 92, which focuses on circumstances in which the President 'may' decline a complaint during investigation, the Bill proposes to remove the President's discretion and instead require the President to decline complaints on the grounds specified in 92(1).

2.6 Stakeholders had mixed views as to whether these changes should be made. This section outlines the views of Anti-Discrimination NSW and the President of the Anti-Discrimination Board on these changes, as well as the views of stakeholders who opposed the changes to section 89B and 92 and those who supported it.

Views of Anti-Discrimination NSW

2.7 Anti-Discrimination NSW opposed the proposed changes to section 89B and 92, stating that by removing the President's discretion to accept or decline a complaint at the initial and

18 *Anti-Discrimination Act 1977,* s 89B.

19 Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, p 3.

investigative stage, the intentions of the Act could be undermined and prevent legitimate claims being investigated.[20]

2.8 Anti-Discrimination NSW advised that the proposed changes would replace the President's discretion to decline complaints under section 89B with a strict requirement to decline a complaint if any of the conditions of section 89B appear to be met. It noted that it would also 'further amend section 89B by adding additional grounds on which the President would be required to decline a complaint'. Anti-Discrimination NSW highlighted that these proposed grounds are similar to existing discretionary reasons under section 92.[21]

2.9 Anti-Discrimination NSW also noted that as the President cannot investigate a complaint until after it is accepted under section 89B, it is not clear from the Bill how the President would be expected to form an opinion about the majority of matters upon lodgement before any investigation has taken place.[22] Further, it explained that currently decisions made under section 89B are not reviewable by the NSW Civil and Administrative Tribunal (NCAT) and can only be challenged through Judicial Review proceedings in the Supreme Court of NSW.[23]

2.10 Anti-Discrimination NSW considered that removing discretion 'would be contrary to the beneficial and remedial nature of the legislation' and was concerned 'that requiring the President to decline complaints based on limited information and prior to investigation risks deterring people from reporting discrimination'. It was also concerned that 'removing existing rights of review would be out of step with principles of administrative law and may also risk reducing protection of rights granted under the Act to the community in NSW'. Anti-Discrimination NSW therefore opposed the removal of the President's discretion under section 89B as proposed in the Bill.[24]

2.11 In terms of section 92 of the Act, Anti-Discrimination NSW explained that currently the President has discretion when determining if a complaint is declined during investigation and complainants have the right to request that their complaint be referred to NCAT if it is declined. Anti-Discrimination NSW was concerned that the proposed change in the Bill to remove this discretion 'could limit existing rights and deter people impacted by discrimination from making complaints'. Anti-Discrimination NSW highlighted that all other Australian jurisdictions allow discretion when accepting or declining discrimination complaints, stating that 'New South Wales would risk being out of step with similar jurisdictions if the existing broad discretion was removed'. However, it noted that Queensland is an exception where 'the Commissioner must reject a complaint where the Commissioner is of the reasonable opinion that it is frivolous, trivial or vexatious, or misconceived or lacking in substance'.[25]

2.12 Further, Anti-Discrimination NSW advised that currently under section 92, a complaint may be declined if the complaint or part of the complaint is frivolous, vexatious, misconceived or lacking in substance. Anti-Discrimination NSW raised concerns that by 'requiring the President to decline complaints where only part of the complaint meets this threshold, risks terminating

20 Submission 122, Anti-Discrimination NSW, pp 3-4.

21 Submission 122, Anti-Discrimination NSW, pp 3-4.

22 Submission 122, Anti-Discrimination NSW, pp 3-4.

23 Submission 122, Anti-Discrimination NSW, p 3.

24 Submission 122, Anti-Discrimination NSW, pp 3-4.

25 Submission 122, Anti-Discrimination NSW, p 8.

meritorious complaints that are made concurrently with complaints of lesser substance'. Anti-Discrimination NSW considered 'that the President's discretion to sever a complaint and accept only those parts of the complaint that appear to meet the threshold for acceptance, whilst declining the parts that do not meet this threshold, should be retained'.[26]

2.13 Dr Annabelle Bennett AC SC, President of the Anti-Discrimination Board, told the committee that it is important that sections 89B and 92 are considered together as 'in the present context, many of the matters sought to be introduced into section 89B are not able to be determined without investigation and are already provided for in section 92'. Dr Bennett commented that 'you are trying to deal with a situation where not every complainant is legally represented, where they do not necessarily come with easy stories or with particularly crystallised stories'. She advised that given this 'there should be a discretion to form that view one way or the other' and generally an investigation is required before a determination can be made.[27]

2.14 Dr Bennett explained that at both the 89B and 92 stage 'there is that discretion and it is exercised', commenting that the statistics show that complaints are declined at those stages.[28] In this regard the following statistics were provided to the committee:

> … [I]t is worth noting that in the last five years, according to the annual reports, on average 8.5 per cent of complaints were settled before conciliation and 17 per cent at conciliation; 19 per cent were declined under section 89B, and a further 8 per cent under section 92, and did not proceed further; 17 per cent were withdrawn by the complainant and 15 per cent were abandoned; 4 per cent were referred to NCAT after being declined under section 92, where leave is then required from NCAT to proceed; and 13 per cent were referred to NCAT for other reasons that included the formation of an opinion that the complaint cannot be resolved.[29]

2.15 Dr Bennett suggested that it would be helpful to have factors in the Act that can be taken into account, such as a complaint being vexatious, however argued that the discretion still needs to remain. Dr Bennet stated 'I think limiting that discretion could do untold harm and have unintended consequences, which is exactly why one should not do it. The existing system works and I think that there would be a huge issue of unfairness to the broader community if that discretion were taken apart'.[30]

2.16 To address the issue of potential vexatious complainants, the President of the Anti-Discrimination Board did, however, put forward alternative suggestions, discussed at paragraph 2.82.

Stakeholders opposed to amending sections 89B and 92

2.17 A number of stakeholders held similar views to that of Anti-Discrimination NSW and disagreed with the proposed amendments to sections 89B and 92 to remove the President's discretion.

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26 Submission 122, Anti-Discrimination NSW, pp 8-9.

27 Evidence, Dr Annabelle Bennett AC SC, President of the Anti-Discrimination Board, 9 June 2020, pp 2 and 6.

28 Evidence, Dr Bennett, 18 August 2020, p 11.

29 Evidence, Dr Bennett, 9 June 2020, p 2.

30 Evidence, Dr Bennett, 18 August 2020, pp 10-11.

2.18 The NSW Bar Association noted that amending section 89B would remove discretion entirely 'by directing that the President "must" decline a complaint in the circumstances outlined'. The Association argued that 'this would transform the discretion to decline inappropriate complaints into a blunt instrument that may result in the premature rejection of complaints that should merit further investigation'. In terms of removing the discretion under section 92, the Association highlighted the importance of maintaining discretion during the investigation process:

> The discretion of the President is an important element in the investigative process as well as in the resolution of complaints. It ensures that there is flexibility with regard to complaints and that members of the community are able to fairly have their issues heard and potentially addressed by conciliation. The President's discretions ensure that the rights of complainants to be heard are appropriately protected by the powers of the Board and may access the investigative process, while also ensuring that the Board's time and resources are not wasted on claims that have no merit. These discretions provide important safeguards for respondents against the progression of unwarranted or inappropriate claims'.[31]

2.19 The NSW Council for Civil Liberties considered 'the curtailing of the President's discretion to be inappropriate'. It was of the view that 'there is no compelling reason' to adopt the proposal in the Bill and that the current provisions that provide discretion by the President is 'a sensible arrangement which preserves the ability of the President to consider the circumstances of each complaint and dispense individualised justice on that basis'.[32]

2.20 Further, Mr Stephen Blanks, Treasurer, Executive Committee, NSW Council for Civil Liberties, indicated that 'removing discretion and imposing duties on an official are simply an opportunity for further litigation if somebody disagrees with the application of the Act in a particular case'. He added that 'the purpose of the board is to provide a relatively informal process for resolving grievances' and the proposed amendments in the Bill 'to the extent that they are designed to remove discretion of the president, are misconceived and will be counterproductive'.[33]

2.21 The Australian Discrimination Law Experts Group also opposed the changes. It explained that 'requiring the President to decline is particularly problematic when it prevents the complaint from proceeding', noting that complaints declined under section 89B are also not able to have their complaint reviewed by NCAT. The Group highlighted that this 'is likely to restrict or prevent victims of unlawful discrimination from seeking redress under the Act'.[34]

2.22 Similarly, the Public Interest Advocacy Centre proclaimed that 'in seeking to remove the discretion of the President in dealing with complaints … has significant implications for the rule of law'. The Centre pointed to the proposed changes under section 89B that would mandate the President to decline complaints in relation to existing grounds and a further seven new grounds, without the ability for this decision to be reviewed by NCAT. The Public Interest Advocacy

31 Submission 190, NSW Bar Association, p 7.

32 Submission 132, NSW Council for Civil Liberties, pp 5-6.

33 Evidence, Mr Stephen Blanks, Treasurer, Executive Committee, NSW Council for Civil Liberties, 11 June 2020, p 2.

34 Submission 124, Australian Discrimination Law Experts Group, p 7.

Centre was concerned that these proposed provisions 'would have the practical effect of excluding legitimate complaints of discrimination' and would undermine the rule of law.[35]

2.23 In terms of section 92, the Public Interest Advocacy Centre indicated that it 'is not aware of evidence that the President has failed to properly exercise the discretion to decline complaints under this section'. The Centre commented that it is not clear why it is necessary then to remove this discretion and was of the view that 'in the context of legislation that seeks to protect the human rights of potentially vulnerable and marginalised people, it is appropriate that the President retains a discretion in relation [to] their handling of complaints'.[36]

2.24 Likewise, Ms Emma Golledge, Director, Kingsford Legal Centre, University of NSW, Sydney, told the committee that in their view 'there is not significant evidence to suggest that there is an issue with the exercise of discretion by the President of the Anti-Discrimination Board'. She advised that the Centre does not support 'the widening of section 89B and think it presents very practical problems as to how it can be properly exercised'.[37]

2.25 In its submission, Kingsford Legal Centre stated that 'declining a discrimination complaint without an investigation has significant due process implications'. It indicated that 'it is not a step that should be taken lightly, especially in the context of legislation designed to protect human rights and where complainants are often people with limited resources'. Kingsford Legal Centre highlighted that many complaints are complex and may not have the required evidence needed at the initial stage for a determination to be made:

> In our experience it is common that the merit of a complaint becomes apparent only after an investigation has started. Because discrimination law is so complex, it can be difficult to present a complaint in the most legally favourable light, especially for vulnerable people who have not received specialist discrimination advice. Perpetrators of discrimination often have critical information and documents, which the President and the complainant only get after an investigation has started. Complainants often do not have this at complaint stage and require assistance to obtain this material.[38]

2.26 In addition, Kingsford Legal Centre argued that the Bill would:

- 'force the President to decline a significant number of meritorious complaints without an investigation
- restrict access to justice for many people who have experienced discrimination, including some of the most vulnerable people in NSW
- reduce public confidence in the discrimination complaints system, as community members would ask why worthy complaints are being declined without an investigation'.[39]

2.27 Along similar lines, the Law Society of NSW argued that the proposed amendments to section 89B and 92 'would have the effect of limiting the President's discretion to determine whether

35 Submission 73, Public Interest Advocacy Centre, pp 1 and 3.

36 Submission 73, Public Interest Advocacy Centre, pp 3 and 7.

37 Evidence, Ms Emma Golledge, Director, Kingsford Legal Centre, University of NSW, Sydney, 11 June 2020, p 21.

38 Submission 26, Kingsford Legal Centre, p 5.

39 Submission 26, Kingsford Legal Centre, p 6.

to accept or decline a complaint, both at the time the complaint is made, and once an investigation has commenced, thereby making it more difficult for complaints to be accepted and proceed to conciliation'. The Law Society of NSW opposed these amendments, arguing 'that barriers to human rights protections in NSW should not be raised without a solid evidence base' and there is no indication that a surge in vexatious complaints are compromising the Boards' ability to fulfil its statutory function in a timely fashion. It also noted that the President currently has the power under section 92 'to decline vexatious complaints, and these powers are being used in appropriate circumstances'.[40]

2.28 Ms Audrey Marsh, Co-Convenor, NSW Gay and Lesbian Rights Lobby, stated that 'the bill as currently drafted places significant hurdles in front of people who are attempting to access justice by making a complaint to the Anti-Discrimination Board'. Ms Marsh said that by replacing the word 'may' with 'must' in section 89B and 'further adding additional criteria that requires rejection, crucially, at this initial stage' would mean 'that a President must deny a complaint that seems, on the mere face of it, to lack substance and to prevent it from proceeding to any investigation phase'. Ms Marsh was of the view that by making this change it is 'very likely that people who make genuine mistakes in seeking justice will be caught up in that and legitimate cases of discrimination will be not heard because of the way this legislation will likely operate'.[41]

2.29 Mr Tim Chate, Solicitor, Intellectual Disability Rights Service, also raised concerns that often their clients do not know what matters to put in their complaint and 'if they miss out on any part of their claim, if the discretion is taken away and they have no right to go to NCAT, a complaint that does have substance and that they should have their rights to proceed with, will be barred'. Mr Chate stated that 'I think that is particularly unfair' and argued that the present approach provides for an informal forum to try and resolve complaints and they usually are resolved by the Board, commenting that 'we would like that to be kept as it is'.[42]

Stakeholders in support of amending sections 89B and 92

2.30 Other stakeholders agreed with the proposed amendments to section 89B and 92 in the Bill, contending that it would allow unmeritorious complaints to be dismissed earlier in the process and bring New South Wales in line with other jurisdictions.

2.31 The Right Reverend Dr Michael Stead, Anglican Church Diocese of Sydney, told the committee that 'it is necessary to change the word "may" to "must" in section 92(1) to ensure that non-meritorious claims – that is, a claim where the President is satisfied that the claim is frivolous, vexatious or misconceived, is satisfied there is no contravention of the Act and so on – do not proceed to conciliation or referral to NCAT'. He advised that 'where a complaint is clearly unmeritorious, there should not be the option to proceed to investigation because of the impact that this has on the respondent'.[43]

40 Submission 84, The Law Society of NSW, p 2.

41 Evidence, Ms Audrey Marsh, Co-Convenor, NSW Gay and Lesbian Rights Lobby, 9 June 2020, pp 19-20.

42 Evidence, Mr Tim Chate, Solicitor, Intellectual Disability Rights Service, 11 June 2020, p 6.

43 Evidence, The Right Reverend Dr Michael Stead, Anglican Church Diocese of Sydney, 11 June 2020, p 11.

2.32 Further, Dr Stead disagreed with the argument put forward by those who were opposed to the removal of the President's discretion, in that it 'may lead to the injustice of a valid complaint being terminated because the President was unable to exercise discretion'. In Dr Stead's views, this would be unlikely. He was of the opinion that the proposed changes in the Bill would not have the effect of removing any meritorious claims from the system, however, instead would allow the President if satisfied to exclude vexatious, misconceived or trivial complaints at an earlier point. Dr Stead went on to say that 'I am very confident in the President that any valid claim is not going to be firstly categorised as vexatious or misconceived'.[44]

2.33 Along similar lines, Mr Christopher Brohier, Legal Counsel for the Australian Christian Lobby, contended that 'the argument that this will somehow stifle meritorious [complaints] cannot have force because the President has to make a decision that these complaints lack substance, lack merit or are frivolous', and 'if that is the finding, clearly they should not get past the gatekeeper'. Mr Brohier argued that changing the wording from "may" to "must" in sections 89B and 92 are 'a modest change which will streamline the process'. Further, Mr Brohier highlighted that the additional matters proposed to be added to sections 89B and 92 under the Bill will 'bring New South Wales law into line with other jurisdictions' and reflect current law. He also contended that the changes would promote natural justice.[45]

2.34 The Human Rights Law Alliance welcomed the changes to sections 89B and 92, stating that 'too many complaints that should never have made it past the President are taking vital time and resources away from other legitimate concerns in the NSW justice system'. It argued that the additional measures proposed in the Bill 'are a good start in making sure that the President declines a complaint if they perceive it to be vexatious or malicious'. The Alliance also pointed to the evidence received by the Federal Parliamentary Joint Committee on Human Rights in its review of the *Australian Human Rights Commission Act 1986* (Cth) where calls were made 'for the decision maker's power in this situation to be better exercised'.[46]

2.35 Likewise, Mr Mark Sneddon, Executive Director, NSW Institute for Civil Society, raised concerns that there is 'a pattern of Anti-Discrimination NSW' not applying its discretion, either at the outset or during the pendency of an investigation, to terminate complaints which lack substance or are frivolous. He noted that 'no administrative decision-maker likes to have their discretion removed', but compared the proposal to what is in the Federal Act which does not completely take away discretion but requires 'the President to turn his or her mind to the question as to whether or not the dispute or a complaint is frivolous, vexatious, misconceived or lacking in substance'. He proclaimed that this is 'not an unreasonable proposition' and could not 'see any rational argument as to why that provision should not be put in the New South Wales Act'.[47]

2.36 Mr Neil Foster, Board Member, Freedom for Faith, also referred to the amendments to the Federal law, stating that 'they seem to us to have a lot of justifications for adoption in New

44 Evidence, Dr Stead, 11 June 2020, pp 11 and 13.

45 Evidence, Mr Christopher Brohier, Legal Counsel for the Australian Christian Lobby, 11 June 2020, pp 12 and 18.

46 Submission 123, Human Rights Law Alliance, p 5.

47 Evidence, Mr Mark Sneddon, Executive Director, NSW Institute for Civil Society, 9 June 2020, pp 13-14.

South Wales law'.[48] In its submission, Freedom for Faith declared its support to the amendments proposed by the Bill that allow 'the earlier termination of complaints which have no merit'. It also noted its support for the wording change from 'may' to 'must', commenting that 'this seems a sensible change' that 'will not remove any other discretions given to the President in fact-finding or forming a judgment on other grounds, but it does signal that where these exclusionary factors are present the complaint should not proceed'.[49] The Anglican Church Diocese of Sydney similarly supported these changes.[50]

Making a complaint after 12 months

2.37 Currently under section 89B(2) of the Act the President has discretion as to whether to decline a complaint if the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint. Some stakeholders raised concerns about the removal of discretion in accepting or declining a complaint on this basis.

2.38 Anti-Discrimination NSW gave evidence that 'a mandatory direction would mean that, where complaints are made more than 12 months after the alleged contravening conduct, the President must decline the complaints even where there are valid and compelling reasons for a delay in lodging a complaint'.[51]

2.39 Dr Bennett explained that there are many circumstances where a complaint is made outside the 12 months which should arguably not be dismissed. In Dr Bennett's view, this specific change would not help at all and only adds to 'the extra burden or the extra decision' of an individual needing to seek leave.[52] Dr Bennett highlighted some of the reasons why people may not lodge a complaint straight away, and noted that removing the President's discretion would limit access to justice:

> People who experience harassment and discrimination are often vulnerable people and members of minority groups who may not be aware of appropriate avenues to complain and/or may have other issues in their lives preventing complaints from being lodged sooner. Complainants may have experienced trauma or be people with various types of disability. People who have experienced discrimination may need to attend health or counselling appointments (whether or not this is related to the discrimination) or have other important life events (such as deaths of loved ones) which may delay their complaint to ADNSW. Removing the President's discretion under s89B would make the complaints process less accessible and responsive to complainants seeking the protection of the ADA, particularly to people who may already have significant barriers to access justice.[53]

2.40 In addition, Dr Bennett advised that although Anti-Discrimination NSW do not record how many complaints were accepted for investigation even though they were lodged more than 12

48 Evidence, Mr Neil Foster, Board Member, Freedom for Faith, 11 June 2020, p 12.

49 Submission 24, Freedom for Faith, pp 2 and 5.

50 Submission 27, Anglican Church Diocese of Sydney, pp 3 and 6.

51 Submission 122, Anti-Discrimination NSW, p 3.

52 Evidence, Dr Bennett, 9 June 2020, p 7.

53 Answers to questions on notice, Dr Annabelle Bennett Ac SC, President of the Anti-Discrimination Board, 1 September 2020, p 2.

months after the alleged conduct, they do record the number that were declined. Dr Bennett provided the following statistics on complaints declined under section 89B(2)(b) for the last seven financial years:

- Year 2012-13 – 12
- Year 2013-14 – 24
- Year 2014-15 – 12
- Year 2015-16 – 16
- Year 2016-17 – 16
- Year 2017-18 – 34
- Year 2018-19 – 28.[54]

2.41 Mr Jonathan Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, argued that requiring the President to decline a complaint which occurred more than 12 months before the making of a complaint is an example of 'the way in which this Bill would operate unjustly'. Mr Hunyor pointed out that this 'would apply to a person complaining of a course of conduct which may have taken place over many years and it would require all those parts of the complaint more than 12 months before the complaint was made to be excluded'. Mr Hunyor provided the following example, noting that they do not support this change:

> So if you consider a woman who has been subject to years of ongoing sexual harassment by an employer, but has been fearful of making a complaint because they cannot afford to lose their job, when that person is finally in a position to bring a complaint or the situation is so unbearable that she feels she has no choice, the President would be required to decline those parts of the complaint that occurred more than 12 months earlier, even though it is a course of conduct, and there would be no discretion to take into account the particular circumstances that flow from the very abuse of power that underlies a discrimination. That is the sort of clearly unjust outcome that could flow from this. So we cannot support these changes.[55]

2.42 Ms Golledge told the committee that 'there are lots of valid reasons' for a complaint being lodged 12 months after the event, including for 'psychological and trauma reasons as well in relation to reporting serious incidents such as sexual harassment at work'. Ms Golledge commented that the Anti-Discrimination Board 'shows good discretion in how they operate in the 12 months' and it is all about 'a balancing of procedural fairness'. Ms Golledge added that they 'do not see a lot of complaints that go back a very long way' and if they do 'it goes to the merit of the complaint', emphasising the need for flexibility in these cases.[56]

2.43 The NSW Gay and Lesbian Rights Lobby said that 'the Bill would significantly impact the ability of victims of discrimination to access justice, by stopping victims from accessing justice where the discrimination occurred over more than 12 months'. The Lobby argued that 'in practice this

54 Answers to questions on notice, Dr Bennett, 1 September 2020, p 2.

55 Evidence, Mr Jonathan Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, 11 June 2020, p 2.

56 Evidence, Ms Golledge, 11 June 2020, p 23.

would mean victims of long periods of discrimination would have their complaints declined entirely, simply because some part of the discrimination occurred more than 12 months earlier'.[57]

2.44 Ms Marsh from the NSW Gay and Lesbian Rights Lobby spoke with the committee further on this issue at a hearing. She said that '12 months is not a long time and there are instances, when you look at the case studies, of very, very long-term, systemic homophobic bullying that occurs in workplaces, especially, that could occur over a period of more than 12 months'. Ms Marsh argued that 'removing the discretion would be a perverse outcome for people who may have reasonable delays in lodgement', as there could be 'a variety of reasons a person might not make a complaint within those first 12 months.[58]

Additional grounds for declining a complaint

2.45 The Bill inserts at the end of section 89B(2)(e) additional grounds on which the President must decline a complaint.[59] This section details the views of stakeholders in relation to a number of these proposed additional grounds under section 89B, including if there is a more appropriate remedy that could be pursued and if the complaint falls within an exception to unlawful discrimination.

A more appropriate remedy

2.46 The Bill introduces a provision that the President must decline a complaint if the President is of the opinion there is another more appropriate remedy that should be pursued in relation to the complaint or part of the complaint.[60]

2.47 There was some discussion during one of the committee's hearings about this proposed amendment and how it would work at the section 89B stage, which is in practice prior to any investigation by the President.

2.48 Mr Nathan Keats, Co-Chair, Law Society of NSW Employment Law Committee, said that 'it is problematic if you are going to form an opinion' about a more appropriate remedy at the section 89B stage. Mr Keats explained that 'if you have got an office holder like the President of the Anti-Discrimination Board forming an opinion it needs to have a proper basis to it, otherwise you have administrative decisions being made in circumstances where they could arguably be capricious and need to be challenged in a more expensive jurisdiction like the Supreme Court'. Mr Keats argued that 'there needs to be something more than an off-the-cuff view formed for the opinion of the President', such as 'a proper inquiry with a proper basis needs to be formed to reach the point of view that it could be struck out'.[61]

2.49 Further, Mr Keats advised that in terms of employment law and the potential of multiple remedies and different claims 'it is very important that these complaints are not automatically

57 Submission 105, NSW Gay and Lesbian Rights Lobby, p 3.

58 Evidence, Ms Marsh, 9 June 2020, p 20.

59 Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, p 3.

60 Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, p 3.

61 Evidence, Mr Nathan Keats, Co-Chair, Law Society of NSW Employment Law Committee, 11 June 2020, p 26.

terminated'. Mr Keats explained that 'it is always a very difficult question as to which remedy to choose' and 'there are always concerns that there could be other issues'. He gave the example of a workplace incident where there is an injury as well as discrimination and the issue that can arise is 'whether the receipt of the money for the discrimination case will then prevent the injury case from happening and act as a common law settlement of a workers compensation case under that legislation'. Mr Keats stated: 'There is a whole series of questions that need to be thought out very carefully before you stop a person proceeding on one complaint and direct them to go somewhere else'.[62]

2.50 Along similar lines, the Kingsford Legal Centre said that this change 'would be contrary to the general principle that people can choose between lawfully available remedies', and 'there is nothing unique to people who have experienced discrimination that would justify denying them this choice'. The Kingsford Legal Centre highlighted that section 92 of the Act already allows the President to make this determination at any stage of an investigation. It further suggested that 'many clients specifically choose a discrimination law remedy over other remedies because of the focus on harm in the conciliation process and an opportunity to voice the impact of discrimination on them', commenting that amending the Act will limit this decision by complainants:

> The broadening of this provision limits the autonomy of complainants to make decisions about how they wish to seek redress and is inconsistent with human rights principles. It treads a very fine and potentially dangerous line of substituting the President's view of the best options for that of the complainant. It is not possible for the President to exercise this effectively without an understanding of all the complex reasons personal to the complainant's position that resulted in the complaint being made.[63]

2.51 Mr Bill Swannie, Lecturer, College of Law and Justice, Victoria University, and Member of the Australian Discrimination Law Experts Group, raised concerns that this decision would not be discretionary, commenting that 'to require that it be mandatory to decline on that ground does not seem to be appropriate at all'. Mr Swannie pointed out that at the Federal level 'that is a discretionary decision that can be made to terminate on that ground', and removing this discretion at the state level 'does not seem to be a suitable method to deal with that ground to decline a complaint'.[64]

2.52 Those that were in support of this change were asked how it might work in practice, and specifically how the President would make such a determination, for example, whether legal advice would need to be obtained.

2.53 Dr Stead from the Anglican Church Diocese of Sydney argued that the 'clause does not require the President to form an opinion', and in most cases the President will say 'I have no opinion on this because I have not made the necessary inquiries'. Dr Stead said that 'it is only going to be in the case where there clearly is a more appropriate remedy', such as if the complaint is being pursued in the courts, that the President would make a determination on this ground.[65]

62 Evidence, Mr Keats, 11 June 2020, p 27.

63 Submission 26, Kingsford Legal Centre, p 8.

64 Evidence, Mr Bill Swannie, Lecturer, College of Law and Justice, Victoria University, and Member of the Australian Discrimination Law Experts Group, 11 June 2020, p 26.

65 Evidence, Dr Stead, 11 June 2020, p 19.

2.54 Mr Foster from Freedom for Faith agreed with Dr Stead insisting that the provision 'simply comes into operation where the President has formed an opinion and it does not require the expenditure of public money to get to that point'. Mr Foster proclaimed that 'it simply requires the President to be of that opinion'.[66]

Complaint falls within an exception

2.55 Under section 89B the Bill also includes a provision that the President must decline a complaint if the complaint falls within an exception to the unlawful discrimination concerned.[67] A number of legal stakeholders involved in this inquiry contended that this would be inappropriate for the President to make this determination at the section 89B stage prior to an investigation.

2.56 The Public Interest Advocacy Centre was of the view that it 'is not appropriate that a decision about whether an exception applies is made at a preliminary stage, before further information is sought from the complainant and a response from the respondent'. The Centre advised that 'the onus of proving that an exception applies ordinarily lies on a respondent' and 'this should not be subverted by having the issue determined before any investigation takes place'. It cautioned that 'in litigation involving this exception, different arbiters have reached very different conclusions about its application, highlighting the inappropriateness of having this as a mandatory ground for [summary] dismissal of a complaint'.[68]

2.57 Likewise, the Law Society of NSW indicated that it does not believe it appropriate to compel the President to make a determination, at the time a complaint is made, about whether the action complained of is covered by an exception. It advised that 'a complaint may not contain sufficient information to allow the President to make an informed decision on the applicability of any exceptions' in the Act. The Law Society of NSW stated that 'due process dictates that if any exceptions do apply, these should be raised by the respondent if and when the complaint is accepted, as is currently the case'.[69]

2.58 The Australian Discrimination Law Experts Group also commented that 'it is not appropriate to decline a complaint on this basis before further information is sought from the complainant and the respondent'. It advised that 'whether or not an exception applies to particular conduct often raises complex factual and legal issues, and the President is unlikely to have these details at the preliminary stage'. The Group also noted that it is unlikely that the President would have the required information from the respondent, who bears the onus for raising and proving that an exception applies, at the time the complaint is lodged. The Group concluded that 'therefore, this proposal has potential dangers, in particular that complaints may be declined without proper consideration of whether an exception really applies'.[70]

2.59 The Kingsford Legal Centre highlighted that the power to decline a complaint on this ground is already provided for under section 89B(2)(a) where it allows the President to decline if 'no part of the conduct complained of could amount to a contravention of a provision of this Act or the regulations'. It also highlighted that section 92 'allows the President to decline a complaint

66 Evidence, Mr Foster, 11 June 2020, p 19.

67 Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, p 3.

68 Submission 73, Public Interest Advocacy Centre, p 6.

69 Submission 84, Law Society of NSW, p 4.

70 Submission 124, Australian Discrimination Law Experts Group, p 10.

at any stage of an investigation if the President is satisfied that "the conduct alleged, or part of the conduct alleged, if proven, would not disclose the contravention of a provision of this Act or the regulations"'. The Kingsford Legal Centre argued that 'these sections would cover the kind of situation referred to in the proposed section 89B(2)(k)'.[71]

2.60 Kingsford Legal Centre noted complexities with this proposed amendment, and how it might limit Human Rights and appropriate remedies:

> In our experience, whether an exception applies is often a matter of contention and argument that requires evidence to be produced as part of the investigation. The use of exceptions needs to be monitored carefully as they represent a curtailing of human rights. We are concerned that this provision has the potential to limit remedies where there are arguable cases as to whether the conduct is covered by the exception. We are especially concerned about the impact for complainants who are legally unrepresented.[72]

Frivolous, vexatious, misconceived or lacking in substance

2.61 Further to the debate on discretionary decision-making, the Bill inserts at the end of section 89B(2)(e) additional grounds on which the President must decline a complaint.[73] One of the additional grounds is that the President must decline a complaint if the President is of the opinion that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance. The Bill also provides a number of matters, as noted in chapter 1, that the President is to consider before determining that a complaint is frivolous, vexatious, misconceived or lacking in substance.[74]

2.62 Currently the provision to decline a complaint if it is found to be frivolous, vexatious, misconceived or lacking in substance is available under section 92 during the investigation stage. The Bill will amend section 89B to also include this at the initial stage of a complaint being lodged.[75] There was much discussion amongst stakeholders as to whether this provision should also be included in section 89B.

Provision already under section 92

2.63 Some stakeholders were of the view that as the President already has this power under section 92, it is not needed at the earlier complaint management stage under section 89B. They argued that the power to decline a complaint on this basis is best placed once an investigation has been conducted otherwise the risk is that meritorious claims could also be declined at this stage.

2.64 Anti-Discrimination NSW noted that the proposed new grounds are similar to existing discretionary reasons for declining complaints under section 92. It explained that 'the President cannot investigate a complaint until after it is accepted under section 89B and it is not clear

71 Submission 26, Kingsford Legal Centre, p 10.

72 Submission 26, Kingsford Legal Centre, p 10.

73 Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, p 3.

74 Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, pp 3-4.

75 *Anti-Discrimination Act 1977,* s 92; Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, p 3.

from the Bill, nor its Explanatory Note, how the President of ADNSW would be expected to form an opinion about the majority of these matters upon lodgement of the complaint *before* any investigation has taken place'. Anti-Discrimination NSW raised concerns that 'requiring the President to decline complaints based on limited information and prior to investigation risks deterring people from reporting discrimination'.[76]

2.65 Kingsford Legal Centre stated that 'sections 89B and 92 of the Act already provide sufficient mechanisms for the President to decline complaints that are frivolous, vexatious, misconceived or lacking in substance'. It commented that it was not clear how the proposed amendment 'would change how discrimination works in a practical sense, except to increase the complexity of discrimination law by adding new legal tests'. Kingsford Legal Centre went on to note that the President frequently uses the powers in the Act to decline vexatious complaints, stating 'we do not think there is a need to strengthen these provisions'.[77]

2.66 Likewise, the Law Society of NSW was of the view 'that the proposed clauses are unnecessary' and that 'the President already has discretion to decline a complaint at any stage during its investigation for a number of reasons', including where a complaint is frivolous, vexatious, misconceived or lacking in substance. It indicated that the President is utilising these discretionary powers under the Act to dismiss such complaints, commenting that 'we therefore cannot identify any benefit that proposed ss 89B(5) and 92(3) would deliver'.[78]

2.67 The Australian Discrimination Law Experts Group stated that the 'proposed new grounds are likely to exclude legitimate complaints of unlawful discrimination'. In terms of vexatiousness, the Group agreed that this should only be determined once an investigation has been undertaken to prevent declining meritorious claims with no mechanism for review by NCAT under section 89B:

> The Bill seeks to make it mandatory for the President to decline a complaint if satisfied that it is 'frivolous, vexatious, misconceived or lacking in substance'. We submit that it is inappropriate to require the President to decline a complaint on this basis without investigation, particularly when this decision operates to prevent a complaint from proceeding further. This requirement is likely to disadvantage people who are unable to afford or obtain legal advice or assistance prior to lodging a complaint, which may result in the complaint being inarticulately expressed.[79]

2.68 The Public Interest Advocacy Centre held a similar view, stating that 'it is a radical step to oblige the President to summarily decline a complaint without investigation that is, in its initial form, misconceived or lacking in substance'. It also highlighted that complaints declined under section 89B are not able to have their complaint further reviewed by NCAT, commenting that 'such an approach may particularly disadvantage people who have not had the benefit of legal or other advice prior to lodging a complaint and are unable to clearly articulate it'.[80]

2.69 Ms Golledge was also of the opinion that this change would disadvantage those people who are unable to articulate their complaints clearly and who may not have obtained legal assistance:

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76 Submission 122, Anti-Discrimination NSW, p 5.

77 Submission 26, Kingsford Legal Centre, pp 7-8 and 12.

78 Submission 84, Law Society of NSW, p 5.

79 Submission 124, Australian Discrimination Law Experts Group, p 8.

80 Submission 73, Public Interest Advocacy Centre, pp 3-4.

> And actually what this Bill does in setting up 89B is it gets rid of those complaints at the initial stage if people cannot properly articulate it. So for people who do not have access to legal services, for people who are experiencing systemic discrimination every day, there are huge barriers here because this is a public message that also says discrimination in human rights is not important, that it is not worth even investigating and the body in New South Wales in charge of protecting human rights is not even going to look into this incident. What sort of message does that send to our communities? What does that say about the society that we live in?[81]

Number of vexatious complaints

2.70 Relevant to the discussion about these changes, and whether the President should be required to decline complaints that are vexatious, the committee considered whether the Anti-Discrimination Board is currently receiving a high number of vexatious complaints.

2.71 The Australian Discrimination Law Experts Group claimed that 'neither the Board nor the NCAT is currently experiencing a larger than usual number of complaints or referrals'. The Group was also of the view that 'there is no evidence of a larger than usual number of complaints that are frivolous, vexatious, misconceived or lacking in substance' and 'very few complaints are referred to the NCAT after being terminated by the President'.[82]

2.72 Ms Marsh highlighted that 'all legal bodies capable of hearing complaints have the possibility of receiving vexatious matters' and that this 'is just the nature of a legal system that affords access to justice and access to legal representatives to the entire community'. She commented that 'we do not believe that wholesale reform of the system as a response to individual issues is a sensible approach to law reform' and that 'the Act has existing mechanisms to consider vexatiousness at an appropriate stage'.[83]

2.73 Along similar lines, the NSW Bar Association raised concerns that 'the proposed Bill is too narrowly focused in approach, as it seeks to amend the Act based on three very specific instances that do not appear to be representative of the cases put to the Board as a whole'. The NSW Bar Association reflected 'that these complaints are not substantially burdening the system and that conciliation is a useful and effective tool in addressing discrimination'. It added that 'as the Act operates now, complaints are being handled adeptly and clearly successfully, as most matters are being dealt with by the Board and not by NCAT" and 'the Bill does not accurately reflect the way complaints are being handled'.[84]

2.74 However, some stakeholders questioned the actions of Anti-Discrimination NSW and the Board, arguing that it continues to investigate vexatious complaints which impacts resources.

2.75 The Australian Christian Lobby stated that 'for far too long, vexatious claims have been allowed to be brought before the Anti-Discrimination Board which cause undue costs, stress, and loss to undeserving everyday Australians'. It suggested that 'the impact of these claims has been financial ruin rather than the obtaining of justice for a legitimate complaint' and that it is not

81 Evidence, Ms Golledge, 11 June 2020, p 23.

82 Submission 124, Australian Discrimination Law Experts Group, p 6.

83 Evidence, Ms Marsh, 9 June 2020, p 19.

84 Submission 190, NSW Bar Association, pp 9-10.

only the respondent but taxpayers 'who must foot the bill for the draining of important legal resources'. The Australian Christian Lobby argued that 'these proceedings may have been avoided if there was effective gatekeeping of vexatious claims by the Anti-Discrimination Board and the NCAT at the beginning of the process'.[85]

2.76 The Institute for Civil Society also contended that 'the NSW Anti-Discrimination Board has accepted and continued to investigate and conciliate vilification and anti-discrimination complaints which it should have declined to accept or should have rejected at an early stage of investigation'.[86] Mr Sneddon from the Institute for Civil Society further commented that he could not see 'any reasonable person being able to argue against the President being required to terminate a complaint either at the outset or later on in an investigation if the President is satisfied the complaint is trivial, vexatious, misconceived or lacking in substance, or if there is no reasonable prospect of the matter being settled by conciliation'.[87]

2.77 Likewise, the Human Rights Law Alliance contended that the NSW Anti-Discrimination Board already has 'sufficient powers to deal with serial complainants and to administer complaints handling procedures in a way that promotes fairness and justice'. However, it raised concerns that this was not currently occurring, with the Board 'allowing serial and vexatious claimants to unjustly pursue clearly unmeritorious claims through NSW Courts'. The Alliance therefore welcomed the Bill, stating that 'vexatious claims by serial litigants are a serious problem for the anti-discrimination regime in NSW and measures must be taken by the Parliament to ensure that the system works properly and in the interests of vulnerable people who have legitimate complaints'.[88]

2.78 On this topic, Dr Bennett provided the following statistics on the number of complainants over the last seven years who have lodged more than 5, 10 or 20 complaints:

- 2012-13 – 22 complainants lodged more than five complaints, two complainants lodged more than 10 complaints and one complainant lodged more than 20 complaints
- 2013-14 – 21 complainants lodged more than five complaints, four lodged more than 10 and none lodged more than 20
- 2014-15 – 22 complainants lodged more than five complaints, one complainant lodged more than 10 and one lodged more than 20
- 2015-16 – 18 complainants lodged more than five, four lodged more than 10 and one lodged more than 20
- 2016-17 – 18 lodged more than five, four lodged more than 10 and no-one lodged more than 20
- 2017-18 – 29 complainants lodged more than five, three lodged more than 10 and none lodged more than 20

85 Submission 23, Australian Christian Lobby, pp 5-6.

86 Submission 22, Institute for Civil Society, p 1.

87 Evidence, Mr Sneddon, 9 June 2020, pp 12-13.

88 Submission 123, Human Rights Law Alliance, pp 2 and 10.

- 2018-19 – 23 complainants lodged more than five complaints, seven lodged more than 10 and one lodged more than 20.[89]

2.79 Dr Bennett added that the above statistics would also include complaints where there are multiple respondents. She explained that 'we tend to divide those up as individual complaints' where it 'would have been filed as five separate complaints even though in effect it was one complaint against a group of respondents'.[90]

2.80 Further, Dr Bennett advised that in the last five years no complaint has been recorded as being declined under section 92 for only being vexatious. She explained that 'this statistic may not reflect complaints that were declined for multiple reasons that included vexation' as the 'database only allows a single reason to be recorded when a complaint is declined'.[91]

2.81 Anti-Discrimination NSW also highlighted that the lodgment of multiple complaints does not necessarily indicate that a complaint is frivolous, vexatious, misconceived or lacking in substance:

> ADNSW notes that multiple complaints about similar conduct may not of itself indicate that a complaint is frivolous, vexatious, misconceived or lacking in substance. It is possible that a respondent has engaged in a persistent and repeated pattern of discriminatory behaviour. In proceedings involving the application of the Act, NCAT has found that "*it does not necessarily follow that a multiplicity of proceedings on similar grounds constitutes vexation*".[92]

An alternative approach

2.82 As mentioned earlier, the President of the Anti-Discrimination Board made a number of suggestions in relation to section 89B, to address complaints that may be frivolous, vexatious or misconceived.

2.83 Dr Bennett firstly emphasised to the committee the importance of the President or the delegate in maintaining its discretion when making decisions about these matters, highlighting again the existing discretion in section 92 for complaints of this nature. Dr Bennett did, however, advise that she sees 'some merit in providing for other considerations to determine in the exercise of discretion whether a complaint is accepted or declined, without the need to undergo investigation and the consequent utilisation of resources'.[93]

2.84 Instead of amendments that would mean a complaint has to be declined if its frivolous, vexatious, misconceived or lacking in substance, Dr Bennett suggested that there be discretion under section 89B for the President to decline complaints of this nature where appropriate. However, Dr Bennett noted that the proposed section 89B(2)(f) in the Bill also includes the provision of 'lacking in substance'. Dr Bennett suggested that 'lacking in substance' be removed

89 Evidence, Dr Bennett, 18 August 2020, pp 2-3.

90 Evidence, Dr Bennett, 18 August 2020, p 3.

91 Answers to questions on notice, Dr Bennett, 8 July 2020, p 2.

92 Submission 122, Anti-Discrimination NSW, p 6.

93 Evidence, Dr Bennett, 9 June 2020, pp 2-3.

'as that requires investigation and is better dealt with under section 92, where such provision exists'.[94]

2.85 Dr Bennett also told the committee she sees 'merit in a provision enabling the decline of a complaint where it has been dealt with by the President, or an authority of the State or the Commonwealth'.[95]

2.86 However, Dr Bennett indicated that 'care should be taken not to introduce uncertainty into the construction of the Act by providing for specific considerations which limit the broad discretion presently available'. She further emphasised this position by stating:

> I must repeat: I am most strongly of the view that any attempts to change the discretionary "may" to a mandatory "must" in either section 89B or section 92 are misconceived, serve no purpose, would inhibit the work of Anti-Discrimination NSW, be contrary to the public interest, have no demonstrated need or benefit and could well undermine the protections appropriately governed by the Act.[96]

Declaring someone a vexatious complainant

2.87 Dr Bennett also suggested that consideration be given to having an additional provision that specifically deals with vexatious complainants.

2.88 Dr Bennett explained that currently Anti-Discrimination NSW and the Board can only deal with a complaint 'one by one' and they 'do not have the opportunity at the moment to look at a vexatious complainant'. Dr Bennett clarified that they do have the ability at section 92 to decline if it is a vexatious complaint (as discussed earlier), but not if it is a vexatious complainant. She was of the view that having this provision at the lodgment stage could be beneficial.[97]

2.89 However, Dr Bennett clarified that multiple complaints does not necessarily indicate that a complainant is vexatious and determining this is set at a high threshold:

> One other point I would make is that the fact that there are multiple complaints about similar conduct does not necessarily indicate that the complaint is frivolous or vexatious, obviously. In fact NCAT has found that it does not necessarily follow that a multiplicity of proceedings on similar grounds constitute vexation. As you would be aware, the concept of what constitutes vexatious is a very high threshold legally.[98]

2.90 Further, Dr Bennett reflected on her years of experience in the court process advising that 'declaring someone a vexatious litigant is a very serious and careful case' and 'it is not easy to get that decision out of a court'.[99] She further emphasised this:

> But also because of the bar – I mean, it is a big call. It is a big call to say, as happens in the courts, that a person is forbidden from lodging in that court any other complaint, be it ever so valid. That is the decision you are making in a court when you declare

94 Evidence, Dr Bennett, 9 June 2020, p 3.

95 Evidence, Dr Bennett, 9 June 2020, p 3.

96 Evidence, Dr Bennett, 9 June 2020, p 3.

97 Evidence, Dr Bennett, 9 June 2020, p 3.

98 Evidence, Dr Bennett, 9 June 2020, p 9.

99 Evidence, Dr Bennett, 9 June 2002, p 5.

> somebody a vexatious litigant – that they are precluded from filing in that court. I can tell you from my own experience it does not always help because it is only that court. They can go to another court and start up there, as has happened in a case in my experience.[100]

2.91 Dr Bennett explained that a provision to declare a complainant as vexatious would need to be brought in at the section 92 stage as the President 'would have to be very careful in applying that' and 'it would have to be after investigation', commenting that 'you cannot do that on the face of it'.[101]

2.92 Dr Bennett also suggested amending section 92 and making it clearer that you can take into consideration more than one of the factors listed in the provision for declining a complaint during investigation. Dr Bennett explained that at the moment the word 'or' is used after each factor and so they are not conjunctive, and although Dr Bennett did not want to make them conjunctive, as that would lessen the discretion, it would be helpful to include a provision such as: 'The President may in his or her discretion take into account more than one of these factors'.[102]

2.93 When asked as to whether giving the President of the Anti-Discrimination Board discretion to refer a vexatious complainant to the Supreme Court for a determination under that system, Dr Bennett replied:

> I do think that giving the President of the board the discretion to refer the matter to the Supreme Court of New South Wales to make a determination that that person is a vexatious complainant could well be an appropriate step to take because it maintains the checks and balances. It gives the President discretion. It also has an objective analysis. It is not the President being judge, jury and executioner either, if you know what I mean. Otherwise complaints could be made or assertions made that it was done by the President for internal purposes, not for external reasons, if I can call it that. I think a referral to an independent and impartial decision-maker such as the court is actually quite a useful check and balance to enable the board to have that ability and also to have an objective appraisal made of that situation. I would see that could be a very helpful solution.[103]

2.94 Other stakeholders were cautious in adding a provision to the Act that would give the President power to determine a complainant as vexatious.

2.95 Mr Sneddon said that he was not opposed to such a proposal but argued that 'the quicker, the better and the more effective remedy is to have the powers we are suggesting, which is the president gets rid of a complaint if the complaint is vexatious, frivolous et cetera, without needing to make a separate assessment about whether or not the complainant is vexatious'. He raised concerns that declaring someone a vexatious complainant is a serious matter and should probably not be a matter for determination by the President of the Anti-Discrimination Board but a body such as NCAT:

100 Evidence, Dr Bennett, 18 August 2020, p 12.

101 Evidence, Dr Bennett, 18 August 2020, p 16.

102 Evidence, Dr Bennett, 18 August 2020, p 16.

103 Evidence, Dr Bennett, 18 August 2020, p 17.

> Making a finding that someone should be treated as a vexatious complainant is a serious finding. Typically, in vexatious litigation statutes the person is then ordered by the court that they cannot commence proceedings without the leave of the court or tribunal. The President is right about that. It requires a serious amount of evidence. I am not sure that Anti-Discrimination NSW is the right body to be making that. You would probably want to give that to NCAT.[104]

2.96 Mr Blanks highlighted that there is already a process for having individuals declared vexatious litigants in the courts but questioned whether there should be a similar function applicable to the Anti-Discrimination Board. He indicated that 'the issue there is has there been a real demonstrated need for it', commenting that although there seems to be some concerns he was not sure that it would 'justify a whole regime for having a vexatious complainant process in the tribunal'. Mr Blanks also highlighted that if an individual were declared a vexatious complainant there would still need to be a process of review for any further complaints that individual wish to bring forward, similar to the courts.[105]

2.97 Mr Hunyor agreed with the concerns raised by Mr Blanks, commenting that they would not support such a proposal as it is a serious undertaking to determine someone a vexatious litigant and there would still need to be a mechanism for that individual to be able to bring forward meritorious complaints:

> There would have to be a process around that and you still would not want to be at a stage where that would absolutely prohibit someone from bringing a complaint. They could simply then be put beyond the law and they can be vilified as much as anyone would like. So there would need to be a consideration of each complaint. So it seems to be that it would just add a level of complexity because you would have to go through a whole process around having someone declared a vexatious complainant and then any new complaint would then have to still be assessed to see whether or not it had sufficient merit.[106]

Committee comments

2.98 The committee acknowledges that the main intent of the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 is to prevent the complaints process from being abused and specifically, to prevent vexatious complaints from proceeding down a path to be investigated, utilising unnecessary resources and unfairly impacting respondents.

2.99 While we note that there were conflicting views by stakeholders as to whether vexatious complaints are indeed taking up the Board's time and resources, the committee was not persuaded by the evidence of the President of the Anti-Discrimination Board in this regard. Indeed, the committee notes a number of cases which have been brought to its attention which clearly raise concerns about how the complaints process is being used.

2.100 The committee is concerned that some individuals have the ability to use the complaints process inappropriately, in situations where they may not have been personally impacted and/or where the acts of potential discrimination are not even occurring in New South Wales. We are

104 Evidence, Mr Sneddon, 9 June 202, p 15.

105 Evidence, Mr Blanks, 11 June 2020, p 5.

106 Evidence, Mr Hunyor, 11 June 2020, p 6.

concerned about the unfair pressure this places on respondents, and how this goes against the very principles of fairness anti-discrimination legislation aims to achieve.

2.101 Despite stakeholders having different views on some of the amendments in this Bill, the committee agrees that there are improvements that could be made to the *Anti-Discrimination Act 1977* to minimise the potential abuse of the complaints process and more generally, improve the complaints handling scheme.

2.102 In terms of sections 89B and 92 of the Act, the committee does not agree with the proposed amendments of these sections as put forward in the Bill. We do, however, recommend that the NSW Government consider amending section 89B and section 92 of the Act to allow the President to 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, and if it does not make out a legal ground for complaints under the Act. We also recommend that a new ground be inserted for refusal if the complaint falls within an exception to unlawful discrimination or vilification. The committee notes that all grounds in both these sections should remain discretionary. Retaining discretion in this regard means that any change would ensure consistency with Commonwealth anti-discrimination provisions in section 32(3)(c) of the *Human Rights and Equal Opportunity Commission Act 1986*.

Recommendation 1

That sections 89B and 92 of the *Anti-Discrimination Act 1977* not be amended as proposed by the Anti-Discrimination Amendment (Complaint Handling) Bill 2020.

Recommendation 2

That the NSW Government consider amending sections 89B and 92 of the *Anti-Discrimination Act 1977* to*:*

- allow the President to 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 Act
- insert a new ground for refusal if the complaint falls within an exception to unlawful discrimination or vilification.

2.103 In terms of vexatious complainants specifically, the committee notes that declaring a complainant as a vexatious litigant is a serious matter and one that should be considered carefully, so as to ensure an individual is not barred from seeking justice for a genuine complaint. The committee notes the President's preference to not make these determinations.

2.104 There already exists in the legal system a now well-established and balanced regime to deal with alleged vexatious litigants. This is the *Vexatious Proceedings Act 2008*. It allows for the making of a vexatious proceedings order in clearly defined circumstances under well accepted criteria. It has now been in operation for over a decade and has established case law and precedent.

However it is limited in its application to matters before courts and tribunals and does not apply to matters before the Board.

2.105 The committee therefore recommends that the Act be amended 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.

Recommendation 3

That the NSW Government amend the *Anti-Discrimination Act 1977* to provide the President of the Anti-Discrimination Board 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.

2.106 The committee also notes that a number of inquiry participants referred to the recommendations made by the Federal Parliamentary Joint Committee on Human Rights in its report for the inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth). The committee agrees, in particular, with one provision of Recommendation 9 in this report, which aims to raise the threshold required to lodge a complaint and places the onus on the complainant to set out the details of the alleged acts, omissions or practices. The basis of this is that any unmeritorious or ill-conceived complaints can be dismissed at an earlier stage of the process. The committee recognises that this would also assist the President in making a determination to decline a complaint if it is found to be frivolous, vexatious or misconceived. The committee therefore recommends that section 89 of the *Anti-Discrimination Act 1977* be amended to provide that the complainant must set out reasonable details of the alleged acts, omissions or practices.

Recommendation 4

That the NSW Government consider amending section 89 of the *Anti-Discrimination Act 1977* to provide that the complainant must set out reasonable details of the alleged acts, omissions or practices.

Chapter 3 Other key issues

The chapter looks at other key issues raised by stakeholders regarding proposed amendments in the Anti-Discrimination (Complaint Handling) Bill 2020. It begins with a discussion on the proposed provision to decline a complaint based on a respondent's cognitive impairment, followed by a discussion on dealing with complaints where a respondent resides in another state or territory. It then considers the proposed removal of the ability to refer complaints to the NSW Civil and Administrative Tribunal and a number of additional changes proposed to be made to the *Anti-Discrimination Act 1977*. Finally, it considers the calls from stakeholders for a broader review of the *Anti-Discrimination Act 1977*.

Cognitive impairment

3.1 The Anti-Discrimination (Complaint Handling) Bill 2020 (the Bill) proposes to insert under section 89B that the President must decline a complaint where a respondent has a cognitive impairment and it is reasonably expected that the cognitive impairment was a significant contributing factor to the conduct that is the subject of the complaint. A cognitive impairment is defined in the Bill as an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia or a brain injury.[107]

3.2 Stakeholders raised a number of concerns in relation to this proposed provision to the *Anti-Discrimination Act 1977* (the Act).

3.3 Anti-Discrimination NSW gave evidence that 'a cognitive impairment should not, per se, be a reason to decline a complaint'. However, Anti-Discrimination NSW noted that 'the intellectual capacity of the parties may be a relevant factor in deciding whether and how to proceed to investigate a complaint'. It added that 'in each case, the parties' capacity will be a question of evidence, which may only come to light during the course of an investigation'.[108]

3.4 Further, Anti-Discrimination NSW said that 'the current definition of disability in the Act is broad and it is unclear how the President would be expected to determine if a respondent has a cognitive impairment prior to conducting an investigation'. It indicated that 'assuming that a person with any type of cognitive impairment is incapable of responding to a complaint may be, of itself, discriminatory'.[109]

3.5 When asked how the Board currently handle matters of cognitive impairment, Dr Annabelle Bennett AC SC, President of the Anti-Discrimination Board, advised:

> It would vary very much with each individual case. I cannot myself at this moment give you the details of the sorts of examples of how that would be dealt with. It would have been very much on the nature of the complaint and what information the respondent can give to enable someone to make an evaluation, bearing in mind that after a complaint is accepted we turn to the respondent to ask the respondent to give information that would assist.[110]

107 Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, pp 3-4.

108 Submission 122, Anti-Discrimination NSW, p 6.

109 Submission 122, Anti-Discrimination NSW, pp 5-6.

110 Evidence, Dr Annabelle Bennett AC SC, President of the Anti-Discrimination Board, 9 June 2020, p 5.

3.6 The Public Interest Advocacy Centre was of the view that 'there are a number of problems with this proposed provision', one of which is that 'the degree of impairment that will bring a respondent within this provision is left undefined'. The Public Interest Advocacy Centre highlighted that 'a mild impairment that has minimal impact upon a person's cognitive function would place a person entirely outside the scope of the Act', therefore stating that such an approach was not supported. The Centre also questioned as to what basis the President could form a view on what could be 'reasonably expected', particularly when 'the President would be required to make this assessment prior to commencing an investigation and therefore prior to requiring information from the respondent'.[111]

3.7 Likewise, the Australian Discrimination Law Experts Group stated that 'there are a number of problems with this provision'. It argued that 'whether or not a person has a cognitive impairment, and whether this impairment was a 'significant contributing factor' to particular conduct raises complex factual and legal issues'. The Group commented that 'it is inappropriate to require the President to decline a complaint on this ground at a preliminary stage', noting that the President would not have the required information at this stage to make such a determination. The Group went on to say that 'more importantly, declining a complaint because of an impairment of the respondent denies the respondent access to justice, contrary to Article 13 of the Convention on the Rights of Persons with Disabilities', and that 'this proposed change should be rejected'.[112]

3.8 Along similar lines, the NSW Gay and Lesbian Rights Lobby was of the view that 'the Bill would significantly impact the ability of victims of discrimination to access justice, by adding unnecessary complexity by requiring victims and respondents to provide details of cognitive function'. The Lobby highlighted that this 'places a burden on possibly unrepresented parties to prove the cognitive function of the respondent either way'.[113]

3.9 Kingsford Legal Centre also commented on this proposed change, commenting that 'it would weaken discrimination protection for marginalised people, including people with a disability', and goes against the purpose of the Act:

> This misunderstands the purpose of discrimination law, which is not to punish perpetrators, but rather to protect marginalised people from discrimination and promote equal opportunity within society. Discrimination is harmful, regardless of whether it is intentional. The question of whether a person's cognitive impairment "was a significant contributing factor to the conduct" will often be complex, especially as intellectual disability is diverse and exists on a spectrum. The question would require expert evidence and may be the subject of significant dispute, increasing the cost of the complaint process and decreasing accessibility. The President would be poorly placed to consider such questions without an investigation as contemplated by the proposed section 89B(2)(l).[114]

3.10 Like other stakeholders, the Law Society of NSW were of the view that this proposed provision 'is highly problematic' and 'may unduly limit complainant's access to justice, and is unnecessary in light of the broad discretionary power to the President to decline complaints during

111 Submission 73, Public Interest Advocacy Centre, pp 6-7.

112 Submission 124, Australian Discrimination Law Experts Group, p 10.

113 Submission 105, NSW Gay and Lesbian Rights Lobby, p 4.

114 Submission 26, Kingsford Legal Centre, p 11.

investigation at s 92' of the Act. It also raised concerns that this change 'would require the President to make a determination on whether the respondent has a cognitive impairment at the stage the complaint is filed – i.e. without conciliation or investigation taking place – and decline the complaint on this basis'.[115]

3.11 Mr Mark Sneddon, Executive Director, NSW Institute for Civil Society, also highlighted that 'when you get the complaint initially it may be ill-formed and all of the details may not be there', so there is a need 'to do some investigations first to work out whether there is substance to it'. In this regard, Mr Sneddon recommended that all of the grounds under section 89B, including this one on cognitive impairment, should be applied later on during the investigation stage under section 92.[116]

3.12 The Intellectual Disability Rights Service explained that it is important that a balanced approach is taken when determining the impact of cognitive impairment as part of a complaint and that discretion of the President is maintained here:

> We submit that the degree of cognitive impairment of the respondent, and its relevance in causing the discriminatory action, are important issues for the Anti-Discrimination Board and the NSW Civil and Administrative Tribunal to consider in trying to protect the respondent against exploitation, whilst at the same time trying to protect the rights of the victim. Despite the respondent's disability, however, it may still be appropriate to make a compensation order against him or her. Also however, apart from the respondent the victim of the discrimination may have a cognitive impairment which makes him or her more vulnerable to discrimination, and therefore again it may be appropriate for him or her to bring a complaint against a respondent with cognitive impairment. Therefore, we suggest that the issue of cognitive impairment should not be a ground on which a complaint "must" be declined. Instead the Act should not be changed and the Anti-Discrimination Board and NSW Civil and Administrative Tribunal should consider this important issue in dealing with the complaint.[117]

3.13 The NSW Council for Civil Liberties said that 'an assessment that a cognitive impairment was or was not a significant contributing factor to the conduct is not a decision that the President of the Board is likely well equipped to make', and noted that 'there is no review available under s89B' by the NSW Civil and Administrative Tribunal (NCAT). Further, the Council suggested that there is a 'possibility, albeit probably rare, that respondents argue in bad faith or dishonestly that they are subject to cognitive impairments in the relevant sense to escape liability for discriminatory remarks'.[118]

3.14 However, by contrast, the Human Rights Law Alliance argued that 'there is evidence of significant time and resources being wasted in the pursuit of vexatious claims against vulnerable individuals who suffer from a cognitive disability and as a result cannot help or filter themselves when engaging in public discourse on political and social issues'.[119]

115 Submission 84, Law Society of NSW, p 4.

116 Evidence, Mr Mark Sneddon, Executive Director, NSW Institute for Civil Society, 9 June 2020, p 15.

117 Submission 71, Intellectual Disability Rights Service, p 5.

118 Submission 132, NSW Council for Civil Liberties, p 6.

119 Submission 123, Human Rights Law Alliance, p 5.

3.15 Further to this, Mr John Steenhof, Managing Director, Human Rights Law Alliance, told the committee that this amendment to the Act 'comes from an actual set of cases that have happened in New South Wales'. When asked how the President would be able to judge a cognitive impairment, Mr Steenhof replied that 'I think it is a matter for evidence and I think, as with any other matter in a discrimination case, it would be bringing and leading expert evidence as to the cognitive impairment of the person who has been complained against'. He added that 'where the President knows or should know that it involves cognitive impairment, it could be affected to short-circuit further complaints being brought and multiple complaints being brought, even at that initial stage'.[120]

Cross-jurisdictional complaints

3.16 The Bill proposes to remove section 88B of the Act which allows for a person to make a complaint to the President even when that person has made a complaint or taken proceedings in relation to the same facts in another jurisdiction, whether in New South Wales or elsewhere. It also provides for NCAT to have regard to any such proceedings, and to the outcome of any such proceedings, in dealing with or determining the complaint.[121]

3.17 Through proposed changes to section 89(B), the Bill also adds a provision that the President must decline a complaint if one or more of the respondents is an individual who has made a public statement to which the complaint relates, and, at the time of making the statement, was a resident of another state or territory as evidenced by the individual's address on the electoral roll, and not in New South Wales. The Bill also puts the onus on the complainant to establish that the respondent was in New South Wales when the statement relating to a complaint was made.[122]

3.18 Stakeholders had opposing views as to whether these changes should be implemented.

Supporting views

3.19 Generally, those who supported the removal of section 88B argued that Anti-Discrimination NSW is over-reaching its responsibilities by dealing with cross-jurisdictional complaints.

3.20 For example, Mr Sneddon contended that Anti-Discrimination NSW is 'some long-arm jurisdiction' given it pursues respondents in other parts of Australia where those respondents have not engaged in any public act in New South Wales. Mr Sneddon questioned whether this 'is a good use of New South Wales taxpayers' money' and commented that 'it is certainly not commendable from the point of view of comity between jurisdictions and the Federation'.[123]

3.21 Freedom for Faith and the Anglican Church Diocese of Sydney were of the view that 'on balance and given the different approach taken in different Australian jurisdictions to discrimination matters, it would seem to be wise to remove s 88B'. They advised that by removing this

120 Evidence, Mr John Steenhof, Managing Director, Human Rights Law Alliance, 9 June 2020, p 14.

121 Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, p 3; *Anti-Discrimination Act 1977* (NSW) s 88B.

122 Anti-Discrimination Amendment (Complaint Handling) Bill 2020, First Print, p 3.

123 Evidence, Mr Sneddon, 9 June 2020, p 12.

provision it 'would not of itself result in a person being unable to make a previously-litigated complaint (unless the section were replaced with an explicit bar on such)', however 'it would send a signal that such matters were not to be regarded as best practice'.[124]

3.22 Robert Balzola and Associates (Legal) Pty Ltd pointed to a current case before the High Court that represents 'the very live issue of forum shopping' and 'is a paramount example of the failure to consider in detail the impact of finely tuned federal jurisdiction to preserve the powers of the states and the Constitutional federal framework…'.[125]

Opposing views

3.23 Those who preferred to retain section 88B raised concerns that removal of this provision would impact on the rights and protection of people who have experienced discrimination or vilification and their ability to make a complaint.

3.24 The Australian Discrimination Law Experts Group argued that 'the proposed exception is vague and uncertain in its drafting' and 'most significantly, it fundamentally misconceives the nature of public statements that amount to vilification'. The Group argued that it would be out of touch with defamation law, not consistent with other jurisdictional law and would prevent legitimate complaints from proceeding:

> In defamation law, public statements are actionable wherever they are read, regardless of where they are published. No other anti-vilification laws in Australia prevent complainants from making a complaint regarding vilification based on where the respondent resides, or where the relevant statements were made. The amendment would remove protection for people in New South Wales ('NSW') for discrimination and vilification by way of public statements made outside NSW by non-residents of NSW. This would prevent legitimate complaints from being investigated and possibly conciliated.[126]

3.25 ACON also stated that it did not support the removal of section 88B from the Act. ACON highlighted that 'Australians interact with services, businesses, governments and individuals across state and federal boundaries' and 'it is important that recourse be made available to a complainant across the borders of states if the complaint relates to an act of discrimination that occurs in more than one state'. It explained that by removing this section it 'diminishes the power of the NSW Anti-Discrimination Act and removes a path for recourse about issues that have occurred in New South Wales'.[127]

3.26 Along similar lines, Ms Audrey Marsh, Co-Convenor, NSW Gay and Lesbian Rights Lobby, highlighted that the 'internet occurs across jurisdictions' and 'people can discriminate and harass across more than one state and territory border'. Ms Marsh explained that it is not always clear to a layperson attempting to access justice through the Anti-Discrimination Board what might be the correct jurisdiction to pursue this and by removing the section from the Act it excludes people who, in error, lodge complaints in an incorrect jurisdiction. Further, Ms Marsh

124 Submission 24, Freedom for Faith, p 5; Submission 27, Anglican Church Diocese of Sydney, p 6.

125 Submission 21, Robert Balzola and Associates (Legal) Pty Ltd, p 18.

126 Submission 124, Australian Discrimination Law Experts Group, pp 9-10.

127 Submission 82, ACON, pp 1-2.

emphasised the importance of the President having discretion to make judgements on such jurisdictional issues.[128]

3.27 Kingsford Legal Centre also commented on the difficulties individuals may face when determining the most appropriate jurisdiction in which to lodge a discrimination complaint. It stated that 'Australian discrimination law is jurisdictionally complex', with 13 pieces of legislation at both the federal and state and territory level with significant overlaps and differences. The Centre observed an extra layer of complexity when considering other areas of law, including employment law, tenancy law and consumer law, that interacts with discrimination law which 'can further complicate jurisdictional questions'.[129]

3.28 Further, Kingsford Legal Centre explained that 'many complaints are made in the "wrong" or multiple jurisdictions because the complainant has been unable to access legal help and does not understand the system'. It argued that by putting in place a 'blanket prohibition on complaints being made in more than one jurisdiction is a blunt instrument' and 'it would rob the President and NCAT of the ability to consider legitimate reasons and personal factors as to why such complaints had been made'. The Kingsford Legal Centre was of the opinion that the current sections in the Act 'provide appropriate safeguards against forum-shopping', which it highlighted from experience was not 'extensive or a significant drain on resources'.[130]

3.29 The Public Interest Advocacy Centre also highlighted that section 88B does not only apply to a person who may take proceedings in another state or territory, but also 'applies to other 'jurisdictions' such as tort law or workplace relations jurisdictions'. It stated that 'before considering repeal of s 88B, significant consideration would need to be given to its broader impact on rights protection'. The Public Interest Advocacy Centre said that the provision for NCAT to have regard to complaints lodged elsewhere and to take into account unreasonable conduct by a party when awarding costs, including the power to award costs where there are 'special circumstances', would prevent complaints being made in more than one jurisdiction arising from one set of facts'.[131]

3.30 Like other stakeholders, Anti-Discrimination NSW raised concerns that removing section 88B of the Act will deter people experiencing discrimination from making complaints and taking action to obtain redress for acts of unlawful discrimination. Echoing the views of others who rejected this change, it stated that 'discrimination law across Australian state and commonwealth jurisdictions is highly complex and people experiencing discrimination are not always aware of the most appropriate forum to complain about unlawful discrimination'. Anti-Discrimination NSW gave the example of a person making an unfair dismissal complaint to the Fair Work Commission that may also include unlawful discrimination. It also added that by NCAT having regard to any such proceedings ensures fairness and removing this would 'deprive people of appropriate avenues for redress'.[132]

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128 Evidence, Ms Audrey Marsh, Co-Convenor, NSW Gay and Lesbian Rights Lobby, 9 June 2020, p 20.

129 Submission 26, Kingsford Legal Centre, p 4.

130 Submission 26, Kingsford Legal Centre, p 4.

131 Submission 73, Public Interest Advocacy Centre, pp 2-3.

132 Submission 122, Anti-Discrimination NSW, pp 11-12.

3.31 On the specific issue of complaints against respondents that reside in other jurisdictions, Dr Bennett noted that this is 'currently under consideration by the courts' and that 'there are matters of legal complexity in the use of and receipt of information over the internet and social media, including where it can be said that the statement was made'.[133]

Referral of complaints to NCAT

3.32 The Bill proposes to omit section 93A which states:

> **93A Referral of complaints to Tribunal at requirement of complainant**
>
> (1) If the President has given a complainant a notice under section 87B (4) or 92, the complainant may, within 21 days after the date on which the notice was given, require the President, by notice in writing, to refer the complaint to the Tribunal.
>
> (2) On receipt of a notice under subsection (1) from the complainant, the President is to refer the complaint to the Tribunal.[134]

3.33 It also proposes to omit the reference to 93A in section 95(1).

3.34 Most stakeholders disagreed with removing this right of appeal to NCAT.

3.35 Anti-Discrimination NSW opposed the removal of the right to have declined complaints referred to NCAT as 'removal of avenues to appeal administrative decisions may limit procedural fairness and deter people from making complaints regarding discrimination'. It advised that the removal of the right to appeal is not consistent with administrative law and could reduce the protection of rights:

> The proposed change creates a situation where the President's decision is without the checks and balances inherent in administrative law. Removing existing rights of review would be out of step with principles of administrative law and may also risk reducing protection of existing rights of the community in NSW.[135]

3.36 The President of the Anti-Discrimination Board, Dr Bennett, emphasised this point, stating that 'people get rights of appeal in all situations and that is considered to be appropriate in administrative law situations'. She commented that 'the fact that some people may misuse that, from my perspective, personally, is not a reason to undermine a system'. Dr Bennett added that it is also important to maintain the 'checks and balances' and to provide 'procedural fairness'. She advised the committee that the statistics show that when a complaint is declined most will not go any further or be referred to NCAT.[136]

3.37 In this regard, Dr Bennett provided the following statistics relating to complaints made to the board in the last five years, only a small proportion of which were referred to NCAT after being declined:

133 Evidence, Dr Bennett, 9 June 2020, p 3.

134 *Anti-Discrimination Amendment Bill 1977,* s 93A.

135 Submission 122, Anti-Discrimination NSW, pp 10-11.

136 Evidence, Dr Bennett, 9 June 2020, p 4.

> … [I]t is worth noting that in the last five years, according to the annual reports, on average 8.5 per cent of complaints were settled before conciliation and 17 per cent at conciliation; 19 per cent were declined under section 89B, and a further 8 per cent under section 92, and did not proceed further; 17 per cent were withdrawn by the complainant and 15 per cent were abandoned; 4 per cent were referred to NCAT after being declined under section 92, where leave is then required from NCAT to proceed; and 13 per cent were referred to NCAT for other reasons that included the formation of an opinion that the complaint cannot be resolved.[137]

3.38 The Law Society of NSW questioned the rationale for the removal of section 93A, also noting that 'there are a relatively low number of complaints referred by the President of the Anti-Discrimination Board to the NCAT each year, and fewer still proceed to finalisation'. It provided the following statistics on complaints referred in the 2018-19 year:

> In 2018-19, the ADB referred 174 complaints to the NCAT, 37 of which were referred under s 93A. During the same period, the NCAT's equal opportunity list – which manages complaints referred by the President of the ADB – finalised 101 matters. This represents a tiny fraction (around 0.15%) of the 67,833 applications that were finalised at the NCAT during 2018-19.[138]

3.39 In addition, the Law Society of NSW noted that NCAT must grant leave to a complainant who is referred under section 93A before proceedings can commence and that a complaint can be dismissed at any stage at the discretion of NCAT for a number of reasons. It noted that one of these reasons is if a complaint is found to be frivolous, vexatious, misconceived or lacking in substance. The Law Society of NSW stated that 'these provisions ensure that NCAT's resources will not be consumed by considering unmeritorious or spurious complaints that have been referred from the Anti-Discrimination Board'.[139]

3.40 Likewise, the Public Interest Advocacy Centre commented that given a complaint can only progress in NCAT once leave is granted this approach 'strikes an appropriate balance and should be retained'. It also noted that if section 93A was removed it 'would require a person who disagrees with a decision of the President to seek review of that decision under the *Administrative Decisions Review Act 1997*' which 'would be a much more complicated and time-consuming process'.[140]

3.41 Kingsford Legal Centre also highlighted this aspect, stating that if section 93A was removed the only way complainants could seek review of a President's decision 'would be to start a judicial review case in the Supreme Court of NSW'. It commented that 'this is a less accessible, and legally narrow, process that typically requires consideration of complex legal issues' and 'many vulnerable people with meritorious complaints would not seek judicial review because they do not pass the complex legal tests for judicial review or are deterred by the inaccessible process'.[141]

3.42 Further, Ms Golledge told the committee that Kingsford Legal Centre supports the current appeal mechanism to NCAT as 'it provides for oversight and is balanced'. She noted that 'there

137 Evidence, Dr Bennett, 9 June 2020, p 2.

138 Submission 84, The Law Society of NSW, p 3.

139 Submission 84, The Law Society of NSW, p 3.

140 Submission 73, Public Interest Advocacy Centre, p 7.

141 Submission 26, Kingsford Legal Centre, pp 12-13.

isn't sufficient evidence of a need for such significant reforms and are concerned that these will significantly curtail access to justice for the very groups that discrimination law is designed to protect'.[142]

Referral to NCAT at the initial stage

3.43 In terms of removing a right of appeal to NCAT, stakeholders highlighted an inconsistency this proposal would create. Stakeholders noted that the changes would mean that if a complaint is declined by the President at the initial stage, under section 89B, the complaint would not be reviewable by NCAT, whereas if it is declined after an investigation, under section 92, it would be reviewable by NCAT.[143]

3.44 The Australian Discrimination Law Experts Group advised that section 89B and section 92 'do not serve the same legislative purpose'. It explained that 'the grounds for declining a complaint under s 89B are relatively clear "threshold" questions', whereas 'the grounds for declining a complaint under s 92 are broader and require evidence to be substantiated'.[144]

3.45 Relevant to this, the Australian Discrimination Law Experts Group also highlighted that the roles of the President and NCAT are 'not equivalent', with each having different powers:

> Whereas the President is an administrative decision-maker, the NCAT is a tribunal with greater powers and mechanisms for finding facts and testing evidence. The President's determination to decline a complaint operates as a signal to complainants and the tribunal, rather than as a gatekeeper. It is a preliminary assessment, but not a final one, warning the complainant and the tribunal that the claim is lacking or inappropriate in some way. This is reinforced at the tribunal level where the complainant bears the additional burden of needing to obtain leave of the tribunal to have their matter determined (s96). These mechanisms exist and operate together to ensure the process is not abused.[145]

3.46 The NSW Council for Civil Liberties held a similar view, stating that 'declining a complaint under s92 involves a different set of considerations from declining under s89B'. It explained that the President is provided 'far broader and discretionary grounds' under section 92 for declining a complaint compared to those given at the initial stage under section 89B. Further, the Council noted that 'declining a complaint under s92 indicates that the President has not identified cause to exercise their s89B powers, and by implication considered that the complaint deserves to move to the investigation phase'.[146]

3.47 In addition, the NSW Council for Civil Liberties emphasised the importance of the right of review of decision making, particularly given the Act relates to discrimination complaints:

> Moreover, as a matter of general principle, NSWCCL considers it preferable, where possible, to provide an opportunity for review of executive decision-making. Though this always carries the potential to induce litigation, it is an essential bulwark against the

142 Evidence, Ms Golledge, 11 June 2020, p 21.

143 *Hansard,* NSW Legislative Council, 27 February 2020, p 7 (Mark Latham).

144 Submission 124, Australian Discrimination Law Experts Group, p 8.

145 Submission 124, Australian Discrimination Law Experts Group, p 8.

146 Submission 132, NSW Council for Civil Liberties, p 5.

> misuse of power by the state. This is especially so in an area of great personal and social significance such as decision-making pursuant to discrimination complaints.[147]

Awarding costs

3.48 Several stakeholders who broadly supported the Bill did not support the removal of section 93A. Some suggested that if a complaint is referred to NCAT under section 93A, costs should be able to be awarded in certain circumstances, for example, if complaints are vexatious.

3.49 Mr Steenhof told the committee that 'the removal of section 93A and the appeal rights is a step too far, but we do see the need to address the problem that it seeks to fix with other methods, such as enlivening costs'.[148] In its submission, the Human Rights Law Alliance explained how this alternative method would work noting that it will dissuade vexatious litigants from pursuing complaints in NCAT:

> A viable alternative would be an enlivening of costs against a vexatious complainant. This would mean that the NCAT Act would be amended to award costs against the complainant if their complaint is found to be vexatious and misconceived by the Tribunal and they have used section 93A of the Act to refer the matter to the Tribunal after the President had dismissed the complaint.[149]

3.50 Mr Sneddon expressed similar views, noting that 'every decision-maker has the capacity to get it wrong'. He stated that 'therefore, as part of the rule of law and accountability, it is important to have a right of appeal from a decision to terminate a complaint'. However, Mr Sneddon suggested that if a complainant wishes to refer their complaint to NCAT after it has been declined by the President then they should carry the risk of adverse costs:

> But if you have a case where the Anti-Discrimination NSW President has made a decision that a complaint should be terminated on the ground that it is vexatious, frivolous, misconceived or lacking in substance and someone wishes to appeal that, it is time to move from the no-costs jurisdiction to a cost-based jurisdiction. If the complainant wishes to pursue that, they should take on some risk of adverse costs orders against them, otherwise they can just escalate this endlessly through NCAT on and on to the prejudice of the respondent.[150]

3.51 Connecting the potential for costs to be awarded in circumstances where the complaints process is misused, the Australian Christian Lobby stated that 'there needs to be balance between the desire to prevent abuse of the claim system and the rights of access to justice and to review of administrator's decisions by the Courts'. It argued that changes do need to be made to section 93A to 'disincentivise worthless claims' being lodged, however removing this section would 'put legitimate claims at right of being rejected at the first hurdle with no power for claimants to contest the decision'. Therefore, it suggested that to 'discourage worthless claims being referred to NCAT by complainants', that NCAT allows respondents to recover legal costs if it finds that the complaint is lacking in substance or is vexatious and malicious. The Australian Christian Lobby also suggested that security of costs should be provided by a complainant when requiring

147 Submission 132, NSW Council for Civil Liberties, p 5.

148 Evidence, Mr Steenhof, 9 June 2020, p 14.

149 Submission 123, Human Rights Law Alliance, pp 7-8.

150 Evidence, Mr Sneddon, 9 June 2020, p 14.

a referral to NCAT if the President declined the complaint based on lacking in substance or is vexatious and malicious.[151]

3.52 Freedom for Faith and the Anglican Church Diocese of Sydney also highlighted the need to achieve the right balance with these issues, noting that there are positives and negatives on either side of the argument. On balance, it contended that the right of referral to NCAT should remain:

> On the one hand, removing the right of referral to NCAT after the President has declined a complaint will mean that a non-meritorious complaint will be more quickly terminated. This will reduce the lengthy and potentially expensive process a respondent will have to endure to see such a complaint finally terminated by NCAT. On the other hand, removal of this right will subject a meritorious complaint to a discretionary decision by the President, one person who may or may not have a full understanding of the issues and who may terminate the complaint unjustly. On balance, despite the potential downsides of continuing proceedings which may have little merit before NCAT, we believe that the right of referral should remain in place.[152]

3.53 However, Mr Neil Foster, Board Member, Freedom for Faith, told the committee that 'we do suggest that a complainant who persists with a complaint after the President has decided not to continue should be at serious risk of paying the respondent's costs should NCAT agree with the President'.[153]

3.54 In a broader sense, the Institute for Civil Society expressed the view that 'it is not appropriate that the anti-discrimination tribunal, justice system and taxpayer resources be used to provide a cost-free public forum for a complainant to repeatedly seek to intimidate and close down those with opposing views'.[154]

3.55 Along similar lines, the Australian Christian Lobby highlighted that given the Anti-Discrimination Board is a no-cost jurisdiction and referrals to NCAT are also free 'the potential for abuse of the process is real', particularly for vexatious litigants:

> There are many examples of respondents who have unjustly incurred significant costs defending themselves against vexatious complaints. Activists can use the process to persecute or punish people simply for having different religious or political convictions. Not only that, but the ADB is able to provide assistance to claimants (but not to respondents) to prosecute their claims including financial and legal advice on their claims.[155]

3.56 However, other stakeholders held an opposing view on the issue of costs. For example, Kingsford Legal Centre stated that it is 'strongly of the opinion that in the area of discrimination law there needs to be effective remedies in generally no costs jurisdictions'.[156] Likewise, Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, told the

151 Submission 23, Australian Christian Lobby, pp 3-5.

152 Submission 24, Freedom for Faith, p 5; Submission 27, Anglican Church Diocese of Sydney, p 6.

153 Evidence, Mr Neil Foster, Board Member, Freedom for Faith, 11 June 2020, p 12.

154 Submission 22, Institute for Civil society, p 2.

155 Submission 23, Australian Christian Lobby, p 5.

156 Submission 26, Kingsford Legal Centre, p 13.

committee that the Public Interest Advocacy Centre does 'not support costs for these sorts of matters'.[157]

3.57 Mr Tim Chate, Solicitor, Intellectual Disability Rights Service Inc. highlighted that their clients do not have the financial resources to pay costs when pursuing complaints. He advised that establishing a cost-based jurisdiction would be a barrier to their clients being able to bring forward a case, stating 'it would be very prohibitive for our clients'.[158]

3.58 Ms Angela Catallo, Committee NSW Council for Civil Liberties and Convenor Asylum Seekers and Refugees Action Group, also felt that establishing a cost-based jurisdiction would defeat the purpose of the Anti-Discrimination Board:

> I would agree that the costs would take away some of the point of having the Anti-Discrimination Board as it runs because at the moment it is a tribunal where you do not need to be a lawyer, you do not need legal assistance. You can simply go to a website, lodge your complaints and have them considered by the President as to whether or not they should go to conciliation. So to bring in anything to do with costs takes away some of the better advantages of the tribunal as it works at the moment.[159]

Other matters

3.59 During the committee's final hearing the President of the Anti-Discrimination Board was asked her opinion on a number of proposals, including whether a person making a complaint of vilification must prove that they have suffered a personal detriment and whether notice be given to a complainant of a decision to decline and be given an opportunity to amend their complaint. This section details Dr Bennett's response to these issues.

Evidence a complainant has suffered a detriment

3.60 Section 88 of the Act relates to vilification complaints and notes that a vilification complaint cannot be made unless each person on whose behalf the complaint is made:

> (a) has the characteristic that was the ground for the conduct that constitutes the alleged contravention, or
>
> (b) claims to have that characteristic and there is no sufficient reason to doubt that claim.[160]

3.61 In its submission, the Institute for Civil Society suggested that section 88 be amended by inserting an additional criteria at the start that 'a vilification complaint cannot be made unless

157 Evidence, Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, 11 June 2020, p 6.

158 Evidence, Mr Tim Chate, Solicitor, Intellectual Disability Rights Service Inc, 11 June 2020, p 9.

159 Evidence, Ms Angela Catallo, Committee NSW Council for Civil Liberties and Convenor Asylum Seekers and Refugees Action Group, 11 June 2020, p 6.

160 *Anti-Discrimination Act 1977,* s 88.

each person on whose behalf the complaint is made has suffered a detriment as a result of the asserted vilification …'.[161]

3.62 During a hearing, Dr Bennett was asked about this proposal and if this suggestion has some merit. Dr Bennett replied that this 'is obviously a matter for Parliament to consider', however her immediate concerns were the practical ability of making that decision:

> I am just thinking of the ability to evaluate it on the part of the people who are receiving the complaint. To what extent would we need to ascertain the nature and extent of the detriment? It is a process issue that I would bring to bear. For example, a mental detriment is a detriment. A job loss might be, for example – an asserted job loss. That would involve other considerations. I am only thinking of the practical problems that we would deal with. It could include hurt. It could include humiliation or ridicule. This could be considered a detriment.
>
> ....
>
> First of all, vilification would bring into account serious contempt, hatred and ridicule. But as a process matter – and I have not thought this through. It is just my personal immediate reaction. If it is a ground for rejection of a complaint that there is no detriment – I am just thinking about how one ascertains that and the practical difficulties of ascertaining that by us, if you see what I mean. It is a significant finding that would have to be made and it is not that straightforward. So, I cannot take it much further than that … It is purely that practical consequence of doing it and the burden – not the burden on our people but the practical ability to come to those decisions if [that] should be a ground for declining.[162]

Notice of a decision

3.63 Section 89B(3) of the Act currently provides for the President to give notice of a decision to accept or decline a complaint to:

> (a) the person who made the complaint, and
>
> (b) if the respondent has been given notice of the complaint, the respondent,
>
> so far as is reasonably practicable, within 28 days after the decision is made.[163]

3.64 During a hearing, Dr Bennett was asked to consider if it would be appropriate for this section to be amended so that the President, having come to a view that it is appropriate to decline, provide a complainant with notice of the intention to decline and be given an invitation to either amend the complaint or alternatively to make submissions as to why the view reached by the President is incorrect.

3.65 Dr Bennett advised that in a practical sense people who make complaints are already given the opportunity 'if they are told there is something wrong with their complaint, to rectify it'. She

161 Submission 22a, Institute for Civil Society, p 5.

162 Evidence, Dr Bennett, 18 August 2020, p 14.

163 *Anti-Discrimination Act 1977,* s 89B(3).

questioned why such a change would need to be made when she did not think 'there is a problem that needs to be addressed in practice'.[164]

3.66 Dr Bennett reflected on the extra processes that may need to be put in place if this was included in the Act as a formal matter:

> It would mean another round at the kitchen for us. I have not thought, nor do I think I could anticipate, what the resource complexities would be. I guess part and parcel of the complexity would be that at the moment what is being done informally to ensure that people are not declined for no reason – that extra burden of having to go through a formal process could be more demanding of us. I suppose the question is – if it gives a complainant an opportunity to rectify the complaint to bring it within the grounds, then other factors would have to come into account. I suppose you would then have to give procedural fairness to the respondent and notify the respondent what the original complaint was, which at the moment we do not have to do if the respondent has not been notified. If it was a draft complaint the respondent would have to be told – no, question mark. If we were going to decline a complaint as it did not meet ground and we were obliged to give the complainant an opportunity to rectify it formally, would we then formally have to give notice to a potential respondent that this process had been gone through?[165]

3.67 Again, Dr Bennett suggested that it is a matter for the Parliament to decide, however she said that if this change was to occur, consideration be taken as to 'whether it has to be a formal process and how it would work'.[166]

3.68 On a side note, Dr Bennett was asked if respondents are provided with the same assistance in putting forward a defence or a response to complaints. Dr Bennett advised that the culture of the Anti-Discrimination Board is 'that we are absolutely neutral'. She explained that 'our clients, if you call them that, are both the applicants and the respondents' and 'ultimately we are trying to get the two parties together, if that is where it goes and we think we can, to conciliate'. Dr Bennett said that this 'often means not helping but advising through the process and the systems both to applicants and respondents'. She stated: 'But we actually balance what we do between them. We do not make the case for the applicants. We do not make the case for the respondents because we are not making a decision. We are trying to resolve it'.[167]

Calls for broader reforms to the Act

3.69 Many stakeholders called for a thorough review of the Act and the introduction of broader reforms that go beyond what is presented in the Bill.

3.70 Ms Marsh highlighted that the Act is not 'perfect', commenting that 'it is an old piece of legislation and there are many things we would like to see changed to better serve the interests of our community'. Ms Marsh argued that 'a piecemeal approach to reform cannot be a substitute for a full and thorough review of the operation of the Act'.[168] Her organisation, the

164 Evidence, Dr Bennett, 18 August 2020, p 15.

165 Evidence, Dr Bennett, 18 August 2020, p 15.

166 Evidence, Dr Bennett, 18 August 2020, p 15.

167 Evidence, Dr Bennett, 18 August 2020, p 11.

168 Evidence, Ms Marsh, 9 June 2020, p 19.

NSW Gay and Lesbian Rights Lobby, advocated instead for the rejection of the Bill and a full review of the Act, including complaint handling. It called for this to be undertaken by an external body in partnership with the community.[169]

3.71 Equally, Kingsford Legal Centre noted that discrimination law has not been comprehensively reviewed in over 20 years. In its view, the proposed Bill does not address the issues currently with the Act:

> NSW discrimination law has not been comprehensively reviewed since the report of the NSW Law Reform Commission in November 1999. The area of law needs comprehensive reform to modernise it, address gaps in protection for vulnerable people, achieve harmony across Australian jurisdictions and increase access to justice. The Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW) (the Bill) would not provide such reform. It would continue a piecemeal approach to discrimination law reform that fails to address underlying issues.[170]

3.72 In this regard, Kingsford Legal Centre called for the rejection of the Bill and the commencement of a 'collaborative process with other jurisdictions to set up a consistent national framework for discrimination protection'. It suggested that the NSW Government:

- guarantee increased funding to the legal assistance sector and specialist discrimination law services
- address concerns about inappropriate complaints by making discrimination law tests simpler
- increase funding for the Anti-Discrimination Board to help strengthen public education around discrimination and provide a more effective preventative strategy
- conduct further consultation on how to improve discrimination processes and accessibility for people with disabilities.[171]

3.73 The Public Interest Advocacy Centre also provided a number of areas in which the Act needs modernisation, including reviewing the blanket exceptions to private educational authorities, the limited civil vilification protections, the out-dated terminology and the failure to include religious belief, or lack of religious belief as a protected attribute, to name a few. The Public Interest Advocacy Centre stated that 'these are just some of the many deficiencies in the current Act', which is 'over 40 years' old and many of its provisions are out-dated and no longer fit for purpose'. The Centre advised that this is why it 'has been working with an advisory body of legal experts and relevant community organisations to consider what changes are needed to better protect people against discrimination and vilification across the state'. It indicated that this will be presented to Government and members of the Parliament late 2020.[172]

3.74 One such organisation working with the Public Interest Advocacy Centre on developing the evidence-base for comprehensive reform is ACON who commented that 'the Act is overdue for modernisation in light of cultural, social and legislative changes since its inception'. ACON advised that 'the Act is no longer a relevant and suitable piece of legislation for New South

169 Submission 105, NSW Gay and Lesbian Rights Lobby, p 4.

170 Submission 26, Kingsford Legal Centre, p 1.

171 Submission 26, Kingsford Legal Centre, p 1.

172 Submission 73, Public Interest Advocacy Centre, pp 1 and 8.

Wales, and we hope to continue to work with PIAC and the NSW Government to reform the Act'.[173]

3.75 A number of stakeholders also pointed to the recommendations made by the Commonwealth Parliamentary Joint Committee on Human Rights in its report for the Inquiry into Freedom of Speech in Australia. It was suggested that the committee should consider the recommendations in that report to reform Anti-Discrimination law in New South Wales. Stakeholders who supported the recommendations of the Joint Committee on Human Rights included the Institute for Civil Society,[174] Australian Christian Lobby,[175] and the Human Rights Law Alliance.[176]

3.76 When asked if there are any aspects of the Act, if a review was undertaken, that needed to be amended to ensure a greater level of efficiency, Dr Bennett acknowledged that there are procedural and non-procedural matters that need to be looked at, for example the language in the Act is out of date, however noted that they are not questions of efficiency. In response to a further question as to whether the complaints process needed to be reformed, Dr Bennett reiterated their suggestion for amendments to section 89B (discussed in chapter 2), however noted that 'the other matters are matters of more substantive issues with the Act, because it is a 1977 Act'.[177]

Passing of the Bill prior to broader reforms

3.77 Some stakeholders contended that the Bill should be passed to address the current issues with the complaints system, and then broader reforms considered at a later time. Generally, these stakeholders argued that broader reforms could take several years, leaving current deficiencies with the Act to continue.

3.78 For example, The Right Reverend Dr Michael Stead, Anglican Church Diocese of Sydney, told the committee that 'whilst we support the further reforms to the Bill, particularly around religious freedom, we would not want to see that as an alternative to the issues with the complaint handling process being dealt with now'. He commented that it would be 'disappointing' if changes were not made now and individuals would have to wait several years for more comprehensive reforms.[178]

3.79 Mr Christopher Brohier, Legal Counsel for The Australian Christian Lobby, and Mr Foster from Freedom of Faith agreed with Dr Stead. Mr Brohier told the committee that he accepts 'the need to look at the whole issue' however the current Bill addresses a 'problem with the actual process of complaint, that needs to be dealt with'.[179] Mr Foster also emphasised this point:

173 Submission 82, ACON, p 3.

174 Submission 22, Institute for Civil Society, pp 2-4.

175 Submission 23, Australian Christian Lobby, p 7.

176 Submission 123, Human Rights Law Alliance, pp 2, 5 and 9-10.

177 Evidence, Dr Bennett, 9 June 2020, pp 9-10.

178 Evidence, The Right Reverend Dr Michael Stead, Anglican Church Diocese of Sydney, 11 June 2020, pp 12-13.

179 Evidence, Mr Christopher Brohier, Legal Counsel for The Australian Christian Lobby ,11 June 2020, p 12.

> … [T]he fact is on the ground there are people who are seriously concerned about some of these issues. I think it is worth dealing with those things rather than leaving it for the overall process, which, as we have seen in the process that has happened through the Federal Parliament, can take a long, long time. I think if there is a problem we should be dealing with it.[180]

3.80 Likewise, the Human Rights Law Alliance emphasised that a full review of the NSW discrimination regime should be considered 'as there are systematic problems that go beyond the Act which suggest that the main problem is not primarily the Act, but how it is currently administered'.[181] However, Mr Steenhof recommended that the Bill be passed and that the broader reforms dealt with later:

> … [F]urther amendments to the Act and the Civil and Administrative Tribunal Act 2013 should be made to prevent the misuse of the complaints procedure under the Anti-Discrimination Act for weaponisation by activists and for the suppression of freedom of speech.[182]

Committee comments

3.81 The committee notes again its concern that the complaints process is able to be misused, potentially wasting the Boards and respondents time and resources. As noted in the previous chapter, the committee is concerned that claims solely involving parties in other jurisdictions or acts of unlawful discrimination occurring elsewhere are being investigated in New South Wales. The committee is also concerned that people are making complaints when they are not even personally affected by the alleged discrimination. We also question whether respondents are receiving the same level of assistance as complainants through the process.

3.82 Many of these proposed amendments supported by proponents of the Bill would have quite distinct negative consequences for claimants and the overall jurisdiction. Removing s88B for example would seriously limit the capacity for an employee who had been subject to discriminatory conduct at the workplace if that employee had also made a workers compensation claim that included in part reference to the discriminatory conduct. Given the entirely different nature of the remedies in the two statutory schemes we should not add to the existing legal complexity by placing further arbitrary bars on remedies.

3.83 While a minority of stakeholders expressly sought to limit the Board's jurisdiction to address vilification complaints by requiring that any complainant must have suffered a personal detriment, much of this discussion failed to engage with the existing legal limitation in section 88 of the Act. The law currently mandates that a vilification complaint can only be made by a person that has (or claims to have and there is no good reason to doubt that claim) the characteristic that was the ground for the conduct that constitutes the alleged contravention.

3.84 The committee acknowledges the calls from stakeholders that a broader review of the Act is needed. We agree with stakeholders that this is an old piece of legislation and requires modernisation. We note the President of the Anti-Discrimination Board indicated that there are

180 Evidence, Mr Foster, 11 June 2020, p 13.

181 Submission 123, Human Rights Law Alliance, p 2.

182 Evidence, Mr Steenhof, 9 June 2020, p 11.

a number of procedural and non-procedural matters that need to be looked at. We also note that a body of legal experts and relevant community organisations are already considering changes to the Act with a view to presenting this to government by the end of this year.

3.85 We therefore recommend that the NSW Government undertake a thorough review of the Act in consultation with key stakeholders, particularly the stakeholders already undertaking a review. We also recommend that the committee comments and concerns by stakeholders as set out in this report also be considered during this review.

Recommendation 5

That the NSW Government undertake a thorough review of the *Anti-Discrimination Act 1977* with the aim of updating and modernising the Act, in consultation with key stakeholders, and specifically addressing the committee comments and concerns identified by stakeholders as set out in this report.

3.86 Specifically, the committee recommends that either as part of the review in Recommendation 5, or separately, the NSW Government consider a number of potential amendments to the *Anti-Discrimination Act 1977* to improve the complaints handling process, as outlined below.

Recommendation 6

That the NSW Government consider potential amendments to the *Anti-Discrimination Act 1977* to ensure that:

- 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
- 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).

3.87 Finally, in terms of the Bill before us, the committee recommends that the Legislative Council proceed to debate the Anti-Discrimination Amendment (Complaint Handling) Bill 2020, and that the committee comments and concerns identified by stakeholders as set out in this report be addressed during debate in the House.

Recommendation 7

That the Legislative Council proceed to debate the Anti-Discrimination Amendment (Complaint Handling) Bill 2020, and that the committee comments and concerns identified by stakeholders as set out in this report be addressed during debate in the House.

Appendix 1 Submissions

No.	Author
1	Name suppressed
2	Mr Garry Burns
2a	Mr Garry Burns
3	Name suppressed
4	Name suppressed
5	Name suppressed
6	Ms Niki Taube Zakrzewski
7	Mr Zenaan Harkness
8	Name suppressed
9	Mr Greg Bondar
10	Mr Graeme Williams
11	Mr David Steele
12	Mr Trent Mongan
13	Name suppressed
14	Name suppressed
15	Name suppressed
16	Mr Brian Scoffell
17	Name suppressed
18	Mr Darren Earley
19	Name suppressed
20	Mr Bruce Lyon
21	Robert Balzola and Associates (Legal) Pty Ltd
22	Institute for Civil Society
22a	Institute for Civil Society
23	Australian Christian Lobby
24	Freedom for Faith
25	FamilyVoice Australia
26	Kingsford Legal Centre
27	Anglican Church Diocese of Sydney
28	Name suppressed
29	Ms Elizabeth and Mr Francis Peoples
30	Name suppressed

No.	Author
31	Mrs Elizabeth Epstein
32	Mr Peter Dobinson
33	Mr Warwick Robertson
34	Mr Bernrd Dixon
35	Name suppressed
36	Mr Colin Graves
37	Mrs Elizabeth Stephens
38	Mr Terrence McDonnell
39	Name suppressed
40	Mr Don Ayres
41	Name suppressed
42	Name suppressed
43	Name suppressed
44	Name suppressed
45	Ms Tess Corbett
46	Miss Paola Cattuzzato
47	Name suppressed
48	Mr Lennard Caldwell
49	Mr Denis Colbourn
50	Mr Karl Rolfe
51	Mr Peter Inns
52	Name suppressed
53	Name suppressed
54	Mr Roderick McLeod
55	Name suppressed
56	Miss Janet Cowden
57	Name suppressed
58	Name suppressed
59	Name suppressed
60	Name suppressed
61	Mr Darrel Nelson
62	Name suppressed
63	Mr Ken Baker
64	Mr Ernest Mitchell
65	Name suppressed

No.	Author
66	Name suppressed
67	Mr Peter Dixon
68	Mr John Cavanagh
69	Mr Dean Addison
70	Mr Barry Rumpf
71	Intellectual Disability Rights Service Inc.
72	Mr Bernard Gaynor
73	Public Interest Advocacy Centre (PIAC)
74	Miss Barbara Bluett
75	Ms Michelle Smith
76	Name suppressed
77	Confidential
78	Name suppressed
79	Name suppressed
80	Mrs Kathleen Donelly
81	Mr Trevor Adams
82	ACON
83	Name suppressed
84	The Law Society of New South Wales
85	Mr Sam Magar
86	Mr Ian Sarah
87	Name suppressed
88	Mr Gordon Smith
89	Name suppressed
90	Mr John Love
91	Mr David Miller
92	Name suppressed
93	Name suppressed
94	Mr Frederick Randal
95	Dr David van Gend
96	Name suppressed
97	Name suppressed
98	Mr Craig Hickman
99	Mr Milton Ingram
100	Name suppressed

No.	Author
101	Name suppressed
102	Mr Peter Worner
103	Name suppressed
104	Mr Alexander Stewart
105	NSW Gay and Lesbian Rights Lobby
106	Name suppressed
107	Name suppressed
108	Ms Samantha Bryan
109	Name suppressed
110	Name suppressed
111	Name suppressed
112	Name suppressed
113	Name suppressed
114	Mr Julian Rogers
115	Name suppressed
116	Mr Terence John Malligan
117	Name suppressed
118	Name suppressed
119	Mr John Ward
120	Name suppressed
121	Mr Luke Caulfield
122	Anti-Discrimination NSW
123	Human Rights Law Alliance
124	Australian Discrimination Law Experts Group
125	Name suppressed
126	Mr Brendan Basone
127	Mr John Campbell
128	Mr Terrence Odgers
129	Mrs Margaret Airoldi
130	Name suppressed
131	Mrs Helen Pearson
132	NSW Council for Civil Liberties
133	Mr Neil Mansfield
134	Mr Luke Maloney
135	Ms Adrienne Hirsch

No.	Author
136	Name suppressed
137	Name suppressed
138	Mr Michael Clarke
139	Mr Brian Morrow
140	Name suppressed
141	Mr Jeff Lay
142	Mr David Billings
143	Name suppressed
144	Mr Anthony Evans
145	Mr Michael Brett
146	Mrs Rosemary Lorrimar
147	Mrs Jacynth Smith
148	Mr Peter Cunningham
149	Name suppressed
150	Name suppressed
151	Name suppressed
152	Mrs Elsie Smith
153	Name suppressed
154	Name suppressed
155	Name suppressed
156	Name suppressed
157	Mr Colin Maynard
158	Name suppressed
159	Name suppressed
160	Name suppressed
161	Name suppressed
162	Mr Wayne Burke
163	Mr Andrew Copp
164	Name suppressed
165	Name suppressed
166	Mr Ganesh Sahathevan
167	Mr Robert Angel
168	Name suppressed
169	Name suppressed
170	Mr Phillip Strickland

No.	Author
171	Mr Gordon Batt
172	Name suppressed
173	Mr Shann and Mrs Jennifer Kellaway
174	Name suppressed
175	Mr Luigi Rosolin
176	Mr Greg Davis
177	Name suppressed
178	Name suppressed
179	Name suppressed
180	Mr Bob and Mrs Vicki Maggs
181	Name suppressed
182	Name suppressed
183	Ms G Mortiss
184	Mr David A W Miller
185	Mr Remo Barbero
186	Name suppressed
187	Mr John Sunol
188	Name suppressed
189	Mrs Fiorina McGillivray
190	The New South Wales Bar Association

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Tuesday 9 June 2020 **Video conference**	Dr Annabelle Bennett AC SC	President, Anti-Discrimination Board of NSW
	Mr Mark Sneddon	Executive Director, NSW Institute for Civil Society
	Mr John Steenhof	Managing Director, Human Rights Law Alliance
	Ms Audrey Marsh	Co-Convenor, NSW Gay and Lesbian Rights Lobby
Thursday 11 June 2020 **Video conference**	Mr Tim Chate	Solicitor, Intellectual Disability Rights Service Inc.
	Mr Jonathon Hunyor	Chief Executive Officer, Public Interest Advocacy Centre
	Mr Alastair Lawrie	Senior Policy Officer, Public Interest Advocacy Centre
	Mr Stephen Blanks	Treasurer, Executive Committee, NSW Council for Civil Liberties
	Ms Angela Catallo	Committee NSW Council for Civil Liberties and Convenor Asylum Seekers and Refugees Action Group
	Mr Christopher Brohier	Legal Counsel for The Australian Christian Lobby
	Mr Neil Foster	Board Member, Freedom for Faith
	The Right Reverend Dr Michael Stead	Anglican Church Diocese of Sydney
	Mr Nathan Keats	Co-Chair, Law Society of NSW Employment Law Committee
	Mr Ali Mojtahedi	Chair, Law Society of NSW Human Rights Committee

Date	Name	Position and Organisation
	Ms Emma Golledge	Director, Kingsford Legal Centre, UNSW Sydney
	Mr Bill Swannie	Lecturer, College of Law and Justice, Victoria University, and Member of the Australian Discrimination Law Experts Group
Tuesday 18 August 2020 ***In camera* hearing** **Video conference**	Witness A Witness B	

Appendix 3 Minutes

Minutes no. 16
Tuesday 10 March 2020
Portfolio Committee No. 5 - Legal Affairs
Macquarie Room, Parliament House, Sydney, at 9.17 am

1. Members present

Mr Borsak, *Chair*
Mr Shoebridge, *Deputy Chair*
Mr D'Adam *(substituting for Mr Moselmane)*
Mr Fang *(substituting for Mrs Ward)*
Mr Farraway
Ms Jackson *(from 9.30 am)*
Mrs Maclaren-Jones
Mr Buttigieg *(participating)*

2. Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

2.1 Terms of reference

The committee noted the terms of reference referred by the House on Thursday 27 February 2020:

That:

(a) The Anti-Discrimination Amendment (Complaints Handling) Bill 2020 be referred to Portfolio Committee No. 5 – Legal Affairs for inquiry and report; and

(b) On tabling of the report by Portfolio Committee No. 5 – Legal Affairs, a motion may be moved without notice that the bill be restored to the notice paper at the stage it had reached prior to referral.

2.2 Proposed timeline

Resolved, on the motion of Mr Farraway: That the committee adopt the following timeline for the inquiry:

- Sunday 26 April 2020 – Submissions close
- Mid to late May 2020 – one full day hearing
- Monday 3 August 2020, 10.00 am – Report deliberative
- Friday 7 August 2020 – Report tabled.

2.3 Stakeholder list

Resolved, on the motion of Mr Farraway: That the secretariat email members with a list if stakeholders to be invited to make written submissions, and that members have two days from the email being circulated to amend the list or nominate additional stakeholders.

2.4 Advertising

The committee noted that the inquiry will be advertised via social media, stakeholder letters and a media release distributed to all media outlets in New South Wales.

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3. Adjournment
The committee adjourned at 4.33 pm, until 9.15 am, Friday 13 March 2020, Jubilee Room, Budget Estimates hearing *(Attorney General and Prevention of Domestic Violence)*.

Sharon Ohnesorge/Jenelle Moore
Committee Clerk

Minutes no. 21
Tuesday 19 May 2020
Portfolio Committee No. 5 - Legal Affairs
Via webex, Sydney, at 2.00 pm

1. Members present
Mr Borsak, *Chair*
Mr Shoebridge, *Deputy Chair*
Ms Jackson
Mr Khan
Mr Latham *(participating)*
Mrs Maclaren-Jones
Mr Moselmane
Mrs Ward

2. Committee membership
The committee noted that the Hon Trevor Khan MLC replaced the Hon Sam Farraway MLC as a member of the committee on 19 May 2020.

3. Previous minutes
Resolved, on the motion of Mr Shoebridge: That draft minutes no. 20 be confirmed.

4. Correspondence
The committee noted the following items of correspondence:

Received

- 20 April 2020 – Email from Ms Gina Higham, Executive Assistant to CEO and Deputy CEO, Legal Aid NSW, to secretariat, advising that they will not be making a submission to the Anti-Discrimination Bill inquiry
- 21 April 2020 – Email from Ms Hazel Francis, Australian Centre for Christianity and Culture, to secretariat, advising that they will not be making a submission to the Anti-Discrimination Bill inquiry
- 21 April 2020 – Email from Mr Murali Sagi, Deputy Chief Executive, Judicial Commission of NSW, to secretariat, advising that they will not be making a submission to the Ant-Discrimination Bill inquiry
- 22 April 2020 – Email from Associate Professor Jason Bosland, Centre for Media and Communications Law, University of Melbourne, to secretariat, advising that they will not be making a submission to the Anti-Discrimination Bill inquiry
- 26 April 2020 – Email from submission author, to committee, attaching a copy of a complaint made to Anti-Discrimination NSW
- 26 April 2020 – Email from submission author, to committee, attaching a copy of a media article in relation to a complaint made with Anti-Discrimination NSW
- 26 April 2020 – Email from submission author, to committee, attaching copies of emails in relation to their complaint made to Anti-Discrimination NSW

- 26 April 2020 – Email from an individual, to committee, providing comment on Mr Mark Latham's second reading speech and attaching various documents
- 27 April 2020 – Email from stakeholder, to committee, attaching email correspondence and various documents
- 12 May 2020 – Email from the Hon Mark Latham MLC, to secretariat, advising that he will be participating for the duration of the inquiry into the Anti-Discrimination Amendment Bill
- 14 May 2020 – Email from an individual, to secretariat, requesting a confirmation to his submission
- 15 May 2020 – Email from an individual, to secretariat, providing further information in relation to his submission.
- 18 May 2020 – Email from Hon Natasha Maclaren-Jones MLC, to secretariat, advising Hon Trevor Khan MLC will substitute for Hon Sam Farraway MLC at the committee meeting on Tuesday 19 May 2020
- 19 May 2020 – Email from Hon Damien Tudehope MLC, to secretariat, advising of changes in memberships in relation to Portfolio Committee's No. 4 and 5.

Resolved, on the motion of Mr Shoebridge: That the committee keep the following items of correspondence confidential, as per the recommendation of the secretariat, as it contains identifying and/or sensitive information and potential adverse mention:

- email dated 26 April 2020 from submission author, to committee, attaching a copy of a complaint made to Anti-Discrimination NSW
- email dated 26 April 2020 from submission author, to committee, attaching a copy of a media article in relation to a complaint made with Anti-Discrimination NSW
- email dated 26 April 2020 from submission author, to committee, attaching copies of emails in relation to their complaint made to Anti-Discrimination NSW
- email dated 26 April 2020 from an individual, to committee, providing comment on Mr Mark Latham's second reading speech and attaching various documents
- email dated 27 April 2020 from an individual, to committee, attaching email correspondence and various documents
- email dated 14 May 2020 from an individual, to secretariat, requesting a confirmation to his submission
- email dated 15 May 2020 from an individual, to secretariat, providing further information in relation to his submission.

Resolved, on the motion of Mr Shoebridge: That any future correspondence received from this individual be treated as confidential correspondence to the committee.

5. Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

5.1 Participating member

Resolved, on the motion of Mrs Ward: That Mr Latham, who has advised the committee that he intends to participate for the duration of the inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020, be provided with copies of all inquiry related documents, including confidential correspondence, submissions and the Chair's draft report.

5.2 Submission no. 187

The committee considered the publication status of submission no. 187 and in particular page three, where the author raises concerns about Mr Shoebridge being biased.

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of submission no. 187.

5.3 Submission no. 72

The committee considered the publication status of submission no. 72, in light of potential adverse comments against third party individuals.

Resolved, on the motion of Mrs Maclaren-Jones: That submission no.72 be circulated to the committee with proposed redactions highlighted, and if no concerns are received via email, the redacted submission be published as partially confidential

5.4 Focus of the inquiry

Resolved on the motion of Mr Khan: That the committee focus this inquiry on the legal implications of the Anti-Discrimination Amendment (Complaints Handling) Bill 2020 and that:

- witnesses invited to the hearing be limited to experts and key organisations
- the following wording be included on the inquiry website: 'This inquiry is limited to examining the legal implications of the proposed amendments in the Anti-Discrimination Amendment (Complaints Handling) Bill 2020. It will not be canvassing individual complaints or cases'.

5.5 Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 2, 2a, 6, 7, 9, 10-12, 16, 18, 20-27, 29, 31-34, 36-38, 40, 45, 46, 48-51, 54, 56, 61, 63-64, 67-71, 73-75, 80-82, 84-86, 88, 90, 91, 94, 95, 98, 99, 102, 104, 105, 108, 114, 116, 119, 121-124, 126-129, 131-135, 138, 139, 141, 142, 144-148, 152, 157, 162, 163, 166, 167, 170, 173, 175, 176, 180 and 183.

5.6 Name suppressed submissions

The committee noted that the following submissions were partially published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1, 3-5, 8, 13, 15, 17, 19, 28, 30, 35, 39, 41-44, 47, 53, 55, 57-60, 62, 65, 66, 76, 79, 83, 87, 89, 92, 93, 96, 97, 100, 101, 103, 106, 107, 109, 110, 112, 113, 115, 117, 118, 120, 125, 130, 136, 137, 140, 143, 149-151, 155, 156, 158-161, 164, 165, 168, 169, 172, 174, 178, 179, 181 and 182.

Resolved, on the motion of Mrs Maclaren-Jones: That the committee keep the author names confidential, as per the request of the author, in submissions 1, 3-5, 8, 13, 15, 17, 19, 28, 30, 35, 39, 41-44, 47, 53, 55, 57-60, 62, 65, 66, 76, 79, 83, 87, 89, 92, 93, 96, 97, 100, 101, 103, 106, 107, 109, 110, 112, 113, 115, 117, 118, 120, 125, 130, 136, 137, 140, 143, 149-151, 155, 156, 158-161, 164, 165, 168, 169, 172, 174, 178, 179, 181 and 182.

5.7 Partially confidential submissions

Resolved, on the motion of Mr Moselmane: That the committee authorise the publication of submission no. 171, with the exception of potential adverse mention which is to remain confidential, as per the recommendation of the secretariat.

Resolved, on the motion of Mr Moselmane: That the committee authorise the publication of submission no. 186, with the exception of identifying and/or sensitive information which are to remain confidential, as per the recommendation of the secretariat and agreed to by the author.

5.8 Pro-forma A

Resolved, on the motion of Mr Shoebridge: That:

- the committee authorise the publication of one copy of Pro-forma A noting how many copies were received
- the committee keep names of the authors confidential, as per the recommendation of the secretariat.

5.9 Public hearing format

Resolved, on the motion of Mr Shoebridge: That the committee:

- hold public hearings via Webex, with members and witnesses to participate remotely, except for the Chair and secretariat
- hold two half day hearings instead of one full day, given the hearings will be held via webex
- hold these hearings on a date to be determined by the Chair and secretariat in consultation with members
- invite the Chair's proposed list of witnesses, as amended, to give evidence to the committee at the hearings and that the secretariat circulate proposed hearing schedules to members.

6. Other business

7. Next meeting

Sarah Dunn
Clerk to the Committee

Minutes no. 22

Tuesday 2 June 2020
Portfolio Committee No. 5 - Legal Affairs
Via teleconference, Sydney at 1.06 pm

1. Members present

Mr Borsak, *Chair*
Mr Shoebridge, *Deputy Chair*
Ms Jackson
Mr Latham *(participating)*
Mrs Maclaren-Jones *(until 1.16 pm)*
Mrs Ward *(from 1:13 pm)*

2. Apologies

Mr Khan

3. Previous minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 21 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- 28 May 2020 – Letter from Hon Mark Latham MLC, to Chair, in relation to the conduct of the inquiry and questions to be sought from Anti-Discrimination NSW.
- 29 May 2020 – Email from Mr Paul McKnight, Acting Deputy Secretary, Department of Communities and Justice, to secretariat, declining the invitation to attend the virtual hearing on 9 June 2020.

5. Inquiry into the Anti-Discrimination Amendment (Complaints Handling) Bill 2020

5.1 Public Submissions

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of submission no. 190.

5.2 Request for information from Anti-Discrimination NSW

The committee considered the request from Mr Latham that it write to Anti-Discrimination NSW seeking a response to written questions, and that the responses be dealt with on a confidential basis and an *in camera* hearing.

Resolved, on the motion of Mr Shoebridge: That the committee:

- reschedule the *in camera* hearing with Anti-Discrimination NSW to late June 2020, on a date to be canvassed by the secretariat
- provide a copy of Mr Latham's correspondence to Anti-Discrimination NSW and note in a cover letter from the Chair that members of the committee may seek answers to the questions listed in the correspondence at the *in camera* hearing

- also include in the cover letter from the Chair to Anti-Discrimination NSW the Legislative Council's position regarding statutory secrecy provisions.

5.3 Request for a submission from NCAT
Resolved, on the motion of Mr Shoebridge: That the Chair write to NCAT again to seek a submission to the inquiry into the Anti-Discrimination Amendment (Complaints Handling) Amendment Bill 2020.

5.4 Inquiry timeline
Resolved, on the motion of Ms Ward: That the committee adopt the following revised timeline for the inquiry:

- Monday 31 August 2020, 10.00 am – Report Deliberative
- Friday 4 September 2020 – Report tabled.

6. Next meeting
Tuesday 9 June 2020, 9.45 am, WebEx virtual public hearing.

Sarah Dunn
Clerk to the Committee

Minutes no. 23
Tuesday 9 June 2020
Portfolio Committee No. 5 - Legal Affairs
Via WebEx videoconferencing, Sydney at 9.55 am

1. Members present
Mr Borsak, *Chair*
Ms Boyd *(substituting for Mr Shoebridge)*
Ms Jackson *(from 10.15 am)*
Mr Khan
Mr Latham *(participating)*
Mrs Maclaren-Jones
Mr Moselmane
Mrs Ward

2. Draft minutes
Resolved, on the motion of Mr Moselmane: That draft minutes no. 22 be confirmed.

3. Correspondence
The committee noted the following items of correspondence:

Received:

- 1 June 2020 – Email from Mr Brandon Bear, Manager – Policy, Strategy Research, Chair, ACON Research Ethics Review Committee, to secretariat, declining the invitation to appear at a hearing on 9 June 2020
- 5 June 2020 – Email and attached letter from a submission author, to Chair, requesting to be invited as a witness to a hearing
- 5 June 2020 – Email and attachment from a submission author, to Chair, advising of an amendment to the previously sent letter.

Sent:

- 4 June 2020 – Letter from Chair, to Dr Annabelle Bennett AC SC, President, Anti-Discrimination NSW, relating to giving evidence at hearings for the inquiry, also attaching correspondence from the Hon Mark Latham MLC containing specific questions
- 5 June 2020 – Letter from Chair, to Hon Justice Armstrong, President, NSW Civil & Administrative Tribunal, inviting them again to make a submission to the inquiry.

4. Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

4.1 Public submission

Resolved, on the motion of Mrs Maclaren-Jones: That the committee authorise the publication of submission no. 189.

4.2 Name suppressed submissions

Resolved, on the motion of Mr Khan: That the committee authorise the publication of submission nos. 14, 52, 78, 111, 153, 154 and 177, with the exception of author names which are to remain confidential, as per the request of the author.

4.3 Partially confidential submission no. 188

Resolved, on the motion of Mr Khan: That the committee authorise the publication of submission no. 188, with the exception of the following which is to remain confidential:

- potential adverse mention, as per the recommendation of the secretariat
- the authors name, as per the request of the author.

4.4 Confidential submission no. 77

Resolved, on the motion of Mr Khan: That the committee keep submission no. 77 confidential, as per the request of the author.

4.5 Virtual hearing proceedings

The Chair briefed members on the proceedings for the day.

4.6 Allocation of questioning

The committee noted the resolution appointing the Portfolio Committee's provides that 'the sequence of questions to be asked at hearings alternate between opposition, crossbench and government members, in that order, with equal time allocated to each'.

4.7 Public virtual hearing

The committee proceeded to take evidence in public via videoconferencing.

The witness was admitted.

The Chair made an opening statement regarding the virtual proceedings and other matters.

The following witness was sworn and examined:

- Dr Annabelle Bennett AC SC, President of the Anti-Discrimination Board.

The evidence concluded and the witness withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Mark Sneddon, Executive Director, NSW Institute for Civil Society.
- Mr John Steenhof, Managing Director, Human Rights Law Alliance.

The evidence concluded and the witnesses withdrew.

The following witness was admitted, sworn and examined:

- Ms Audrey Marsh, Co-Convenor, NSW Gay and Lesbian Rights Lobby.

The evidence concluded and the witness withdrew.

The virtual hearing concluded at 12.45 pm.

5. Correspondence from submission author

The committee noted the correspondence received from a submission author on 5 June 2020, requesting to be invited to a hearing.

Mrs Maclaren-Jones and Mrs Ward declared that they know of the submission author as they are a Liberal Party member.

Resolved, on the motion of Mrs Ward: That the committee:

- invite the submission author to an *in camera* hearing, on a date to be canvassed by the secretariat
- request the submission author to focus their evidence on the amendments in the Anti-Discrimination Amendment (Complaints Handling) Bill 2020 and not on the specifics of individual complaints or cases.

6. Next meeting

The committee adjourned at 12.55 pm, until Thursday 11 June 2020, 10.00 am, WebEx virtual hearing.

Sarah Dunn
Clerk to the Committee

Minutes no. 24

Thursday 11 June 2020
Portfolio Committee No. 5 - Legal Affairs
Via WebEx videoconferencing, Sydney at 10.10 am

1. Members present

Mr Borsak, *Chair*
Mr Shoebridge, *Deputy Chair (until 2.00 pm)*
Ms Jackson
Mr Khan
Mr Latham *(participating)*
Mrs Maclaren-Jones
Mr Moselmane
Mrs Ward

2. Correspondence

The committee noted the following items of correspondence:

Received:

- 10 June 2020 – Letter from the Hon John Ajaka MLC, President of the Legislative Council, to Chair, in relation to a complaint received following the hearing on 9 June 2020.

Sent:

- 10 June 2020 – Letter from Chair, to a submission author, in reply to the author's letter of 5 June 2020.

Resolved, on the motion of Mr Shoebridge: That the committee keep the following items of correspondence confidential, as per the recommendation of the secretariat, as they contain identifying and/or sensitive information:

- 5 June 2020 – Email and attached letter from a submission author to the Chair, requesting to be invited as a witness to a hearing
- 5 June 2020 – Email and attachment from a submission author to the Chair, advising of an amendment to the previously sent letter.

Resolved, on the motion of Mr Moselmane: That the committee keep the following items of correspondence confidential, as per the recommendation of the secretariat, as they contain identifying and/or sensitive information:

- 10 June 2020 – Letter from the Hon John Ajaka MLC, President of the Legislative Council, to Chair, in relation to a complaint received following the hearing on 9 June 2020
- 10 June 2020 – Letter from Chair to a submission author, in reply to the author's letter of 5 June 2020.

3. Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

3.1 Public virtual hearing

The committee proceeded to take evidence in public via videoconferencing.

The witnesses were admitted.

The Chair made an opening statement regarding the virtual proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Tim Chate, Solicitor, Intellectual Disability Rights Service Inc.
- Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre
- Mr Alastair Lawrie, Senior Policy Officer, Public Interest Advocacy Centre
- Mr Stephen Blanks, Treasurer, Executive Committee, NSW Council for Civil Liberties
- Ms Angela Catallo, Committee NSW Council for Civil Liberties and Convenor Asylum Seekers and Refugees Action Group.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Christopher Brohier, Legal Counsel for The Australian Christian Lobby
- Mr Neil Foster, Board Member, Freedom for Faith
- The Right Reverend Dr Michael Stead, Anglican Church Diocese of Sydney.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Nathan Keats, Co-Chair, Law Society of NSW Employment Law Committee
- Mr Ali Mojtahedi, Chair, Law Society of NSW Human Rights Committee
- Ms Emma Golledge, Director, Kingsford Legal Centre, UNSW Sydney
- Mr Bill Swannie, Lecturer, College of Law and Justice, Victoria University, and Member of the Australian Discrimination Law Experts Group.

The evidence concluded and the witness withdrew.

The virtual hearing concluded at 1.45 pm.

3.2 Correspondence from the President

The committee considered the correspondence received 10 June 2020 from the Hon John Ajaka MLC, President, Legislative Council, attaching a complaint from a litigant after being named during the hearing on 9 June 2020.

Mr Khan moved: That the committee redact the name of the litigant referred to by name during the virtual public hearings on 9 and 11 June 2020, subject to review of the transcript by the secretariat in consultation with the Chair.

Mr Shoebridge moved: That the motion of Mr Khan be amended by inserting at the end an additional resolution: 'That the Chair have discretion to deal with any further correspondence from this litigant, by retaining it on a confidential basis or by referring it to the committee for consideration if required'.

Amendment of Mr Shoebridge put and passed.

Original question of Mr Khan, as amended, put and passed.

3.3 Proposed *in camera* hearing

Resolved, on the motion of Mr Moselmane: That the committee:

- invite Witness A to appear at a *in camera* hearing for 45 minutes
- invite Witness B to appear at a *in camera* hearing for 1.5 hours.

4. Next meeting

The committee adjourned at 2.04 pm, *sine die.*

Sarah Dunn
Clerk to the Committee

Minutes no. 25

Thursday 18 June 2020
Portfolio Committee No. 5 - Legal Affairs
Macquarie Room, Parliament House, Sydney at 4.59 pm

1. Members present

Mr Borsak, *Chair*
Mr Shoebridge, *Deputy Chair*
Ms Jackson
Mr Khan
Mrs Maclaren-Jones
Mr Martin (substituting for Mrs Ward)
Mr Moselmane

***

2. Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

2.1 Revised timeline

Resolved, on the motion of Mr Khan: That the committee adopt the following revised timeline for the inquiry:

- Monday 14 September 2020, 10.00 am – Report Deliberative
- Friday 18 September 2020 – Report tabled.

3. Other business

4. Next meeting

The committee adjourned at 5.06 pm, *sine die.*

Stephen Frappell / Tina Higgins
Clerk to the Committee

Minutes no. 28
Tuesday 18 August 2020
Portfolio Committee No. 5 - Legal Affairs
Via WebEx videoconferencing, Sydney at 9.05 am

1. Members present
Mr Borsak, *Chair*
Mr Shoebridge, *Deputy Chair*
Mr Buttigieg
Ms Jackson
Mr Khan
Mr Latham *(participating)*
Mrs Maclaren-Jones
Mrs Ward

2. Draft minutes
Resolved, on the motion of Mr Shoebridge: That draft minutes no. 27 be confirmed.

3. Correspondence
The committee noted the following items of correspondence:

Received:

- 16 June 2020 – Letter from the Hon Justice Lea Armstrong, President, NSW Civil & Administrative Tribunal, to Chair, declining to provide a submission to the inquiry
- 25 June 2020 – Email from Mr Greg Bondar, NSW & ACT State Director, FamilyVoice Australia, to committee, following up his request to appear at a hearing for the inquiry into the Anti-Discrimination Amendment (Complaints Handling) Bill 2020
- 25 June 2020 – Email from Mr Greg Bondar, NSW & ACT State Director, FamilyVoice Australia, to secretariat, asking the committee to reconsider inviting him to appear at a hearing for the inquiry into the Anti-Discrimination Amendment (Complaints Handling) Bill 2020
- 29 June 2020 – Email from Mr Tim Chate, Solicitor, Intellectual Disability Rights Service Inc, to secretariat, providing a clarification to the transcript of 11 June 2020.

Sent:

- 25 June 2020 – Email from secretariat, to Mr Greg Bondar, NSW & ACT State Director, FamilyVoice Australia, advising that the committee considered his request and was not able to invite all stakeholders to appear at its hearings for the inquiry into the Anti-Discrimination Amendment (Complaints Handling) Bill 2020
- 30 June 2020 – Email from secretariat, to Mr Greg Bondar, NSW & ACT State Director, FamilyVoice Australia, re-iterating on behalf of the Chair that there are no further public hearings and his request to appear as a witness was considered by the committee.

4. Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

4.1 Answers to questions on notice and supplementary questions
The committee noted that the following answers to questions on notice and additional information was published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from Dr Annabelle Bennett, President of the Anti-Discrimination Board, received on 8 July 2020
- answers to questions on notice from Mr Stephen Blanks, NSW Council for Civil Liberties, received on 21 June 2020
- answers to questions on notice from Ms Emma Golledge, Kingsford Legal Centre, received on 7 July 2020

- additional information from Dr Michael Stead, Anglican Church Diocese of Sydney, received 18 June 2020.

4.2 Clarification to the transcript
Resolved, on the motion of Mr Khan: That a footnote be included in the transcript of 11 June 2020 noting the clarification received by Mr Tim Chate, Solicitor, Intellectual Disability Rights Service Inc.

4.3 Report deliberative
The committee noted that the report deliberative scheduled at 9.00 am, Monday 14 September 2020 will be held in person.

4.4 Questions on notice and supplementary questions
Resolved, on the motion of Mrs Ward: That witnesses at the *in camera* hearing on 18 August 2020 be requested to return answers to questions on notice and supplementary questions within seven days after the date on which questions are forwarded to witnesses.

4.5 Allocation of questioning
Resolved, on the motion of Ms Jackson: That the allocation of questions at today's hearing be determined by the Chair.

4.6 *In camera* virtual hearing
The committee proceeded to take evidence *in camera* via videoconferencing.

Witness B was admitted.

The Chair made an opening statement regarding the virtual proceedings and other matters.

The Chair also reminded Witness B that they did not need to be sworn, as they had been sworn at another hearing.

The evidence concluded and Witness B withdrew.

Witness A was admitted.

The Chair made an opening statement regarding the virtual proceedings and other matters.

Witness A was sworn and examined

The evidence concluded and Witness A withdrew.

The virtual hearing concluded at 12.00 pm.

4.7 Publication of *in camera* transcript
Resolved, on the motion of Mr Khan: That the secretariat review the *in camera* transcript of Witness B's appearance on 18 August 2020, with a view to identifying sections that are useful for the report and may be able to be published, subject to agreement from members via email and consultation with Witness B.

5. Next meeting
The committee adjourned at 12.03 pm, until 9.00 am, Monday 14 September 2020, report deliberative.

Sarah Dunn
Clerk to the Committee

Draft minutes no. 29

Monday 14 September 2020
Portfolio Committee No. 5 - Legal Affairs
Room 814/815, Parliament House, Sydney at 9.08 am

1. Members present

Mr Borsak, *Chair*
Mr Shoebridge, *Deputy Chair*
Mr Buttigieg
Ms Jackson *(from 9.15 am)*
Mr Khan
Mr Latham *(participating via videoconference until 10.54am)*
Mrs Maclaren-Jones
Mrs Ward

2. Draft minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 28 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 1 September 2020 – Email from Ms Emma Cherrington, Research Officer, Anti-Discrimination NSW, confirming the President has no objections to the publication of sections of the *in camera* transcript of 18 August 2020 as proposed by the committee.

Sent:

- 25 August 2020 – Email from secretariat, to Dr Annabelle Bennett AC SC, President of the Anti-Discrimination Board, seeking agreement on sections of the *in camera* transcript of 18 August 2020 to be published by the committee
- 2 September 2020 – Email from secretariat, to Witness A, following up a response to the question taken on notice at the *in camera* hearing on 18 August 2020.

Resolved, on the motion of Mrs Ward: That the committee keep confidential the correspondence sent to Witness A on 2 September 2020, following up a response to the question taken on notice at the in camera hearing on 18 August 2020, as it contains identifying information.

4. Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

4.1 Answers to questions on notice

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of answers to questions on notice from Dr Annabelle Bennett AC SC, President of the Anti-Discrimination Board, received 1 September 2020, with the exception of identifying and/or sensitive information which are to remain confidential, as per the request of Dr Bennett.

4.2 Consideration of Chair's draft report

The Chair submitted his draft report entitled *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, which, having been previously circulated, was taken as being read.

Chapter 1

Mr Shoebridge moved: That the following paragraph 1.7 be omitted:

'Mr Latham emphasised that the provisions in the Act are 'open to abuse' and argued that the current provisions of the Act are limited, including:

- the appeal process to the NSW Civil and Administrative Tribunal (NCAT) is 'a second bite of the cherry, eating up scarce resources in the New South Wales legal system at a time when court backlogs are long and getting longer'
- there is inconsistency in what can be reviewed by NCAT with 'a decision by the Anti-Discrimination Board to decline a complaint in whole or in part is not reviewable by the tribunal, yet a decision to discontinue an investigation is reviewable'
- complaints are lodged with the Anti-Discrimination Board at no cost and can be referred to NCAT as part of a no-cost jurisdiction, however penalties up to $100,000 can be issued by NCAT payable to the complainant, who can 'make a tidy profit', and this can result in lengthy and costly legal processes for respondents
- 'the threshold for the acceptance of complaints at the Anti-Discrimination Board is minimal', where complaints can be 'lodged in writing and they need not demonstrate a prima facie case'
- there is no requirement, as in other states, that the President 'must' decline complaints on matters that are:
  - more than 12 months old
  - outside the scope of the Act
  - where someone has falsely lodged a complaint on behalf of someone else
  - vilification cases where the person making the complaint does not have the characteristic allegedly being vilified.
- complaints can be lodged in New South Wales when the respondent resides in other states and the risk of 'forum shopping' due to the 'low threshold' in New South Wales.'

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mr Shoebridge.

Noes: Mr Borsak, Mr Khan, Mrs Maclaren-Jones, Mrs Ward.

Question resolved in the negative.

Mr Shoebridge moved: That the following paragraph 1.10 be omitted:

'In addition, Mr Latham commented that 'we must ensure that anti-discrimination provisions are not abused, that activists do not use them as a blunt instrument for personal financial gain or vengeance, or for political purposes trying to silence those who simply hold views with which they disagree.'

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mr Khan, Mrs Maclaren-Jones, Mr Shoebridge, Mrs Ward.

Noes: Mr Borsak.

Question resolved in the affirmative.

Chapter 2

Resolved, on the motion of Mr Khan: That paragraph 2.45 be amended by omitting: 'Some of these additional grounds have been discussed earlier in the report, including a complaint being declined if it is frivolous, vexatious, misconceived or lacking in substance, if the respondent resides in another state or territory, and if the respondent has a cognitive impairment.'

Mr Shoebridge moved: That the following paragraphs 2.98 to 2.103 be omitted:

'The committee acknowledges that the main intent of the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 is to prevent the complaints process from being abused and specifically, to prevent vexatious complaints from proceeding down a path to be investigated, utilising unnecessary resources and unfairly impacting respondents.

While we note that there were conflicting views by stakeholders as to whether vexatious complaints are indeed taking up the Board's time and resources, the committee was not persuaded by the evidence of the President of the Anti-Discrimination Board in this regard. Indeed, the committee notes a number of cases which have been brought to its attention which clearly raise concerns about how the complaints process is being used.

The committee is concerned that some individuals have the ability to use the complaints process inappropriately, in situations where they may not have been personally impacted and/or where the acts of potential discrimination are not even occurring in New South Wales. We are concerned about the unfair pressure this places on respondents, and how this goes against the very principles of fairness anti-discrimination legislation aims to achieve.

Despite stakeholders having different views on some of the amendments in this Bill, the committee agrees that there are improvements that could be made to the *Anti-Discrimination Act 1977* to minimise the potential abuse of the complaints process and more generally, improve the complaints handling scheme.

While the committee agrees that discretion is important in this type of complaints process, and that most grounds in section 89B(2) should remain discretionary, we believe there is merit in the President being required to decline complaints if they are frivolous, vexatious, misconceived or lacking in substance both in the initial stage of the complaints process, and even later if it becomes apparent that this is the case. It is important that these types of complaints are able to be dismissed as early as possible so that respondents are not impacted by complainants who are clearly misusing the Act and diverting the Board's resources towards the investigation of unmeritorious complaints.

With this in mind, the committee recommends that the NSW Government amend section 89B and section 92 of the Act to require the President to 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, and if it does not make out a legal ground for complaints under the Act. To ensure consistency between the two sections we also recommend that any other grounds that currently exist under section 92 be inserted in section 89B. The committee notes that the remaining grounds in both these sections should remain discretionary.',

and the following new paragraphs be inserted instead:

'The overwhelming balance of the evidence before the committee was that the system was not being negatively impacted by vexatious or unmeritorious complaints and that there were compelling reasons to retain the President's discretion to make determinations on threshold issues.

There were individual cases that were raised with the committee that, on the material before it, suggested certain complaints would likely not succeed if fully tested. However the evidence from all the engaged and well-informed stakeholders in the system was that these cases do not distract the resources, direction or effectiveness of the scheme to any material extent.

On the other hand there was powerful and informed evidence before the committee that removing the discretion of the President and requiring complaints to be refused before any investigation had been performed would be contrary to the purposes of the Act. It would likely see meritorious cases dismissed because they were not properly pleaded and would place significant additional cost and expense on the system, both for complainants and the Board. Such an amendment would almost certainly impact those in the community most in need of the Acts protection the harshest. This includes people with disability, marginalised people and people without the means to access legal assistance.'

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mr Shoebridge.

Noes: Mr Borsak, Mr Khan, Mrs Maclaren-Jones, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That the following new recommendation be inserted after paragraph 2.103:

'**Recommendation X**
That sections 89B and 92 of the *Anti-Discrimination Act 1977* not be amended as proposed by the Anti-Discrimination Amendment (Complaint Handling) Bill 2020.'

Mr Shoebridge moved: That the following Recommendation 1 be omitted:
'That the NSW Government amend sections 89B and 92 of the *Anti-Discrimination Act 1977* to:

- require the President to 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 Act
- insert a new ground for refusal if the complaint falls within an exception to unlawful discrimination or vilification
- ensure that the two sections are harmonious, noting that the remaining grounds under each provision are to remain discretionary.'

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mr Shoebridge.

Noes: Mr Borsak, Mr Khan, Mrs Maclaren-Jones, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mrs Ward: That Recommendation 1 be amended by omitting 'the NSW Government amend sections' and inserting instead 'the NSW Government consider amending sections'.

Mrs Ward moved: That Recommendation 1 be amended by:

(a) omitting 'require the President' and inserting instead 'allow the President'

(b) omitting 'ensure that the two sections are harmonious, noting that the remaining grounds under each provision are to remain discretionary'.

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mrs Maclaren-Jones, Mr Shoebridge, Mrs Ward.

Noes: Mr Borsak, Mr Khan.

Question resolved in the affirmative.

Mr Shoebridge moved: That paragraph 2.103 be amended by inserting at the end: 'Retaining discretion in this regard means that any change would ensure consistency with Commonwealth anti-discrimination provisions in section 32(3)(c) of the *Human Rights and Equal Opportunity Commission Act 1986*.'

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mrs Maclaren-Jones, Mr Shoebridge, Mrs Ward.

Noes: Mr Borsak, Mr Khan.

Question resolved in the affirmative.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted before paragraph 2.104:

'There already exists in the legal system a now well-established and balanced regime to deal with alleged vexatious litigants. This is the *Vexatious Proceedings Act 2008*. It allows for the making of a vexatious

proceedings order in clearly defined circumstances under well accepted criteria. It has now been in operation for over a decade and has established case law and precedent. However it is limited in its application to matters before courts and tribunals and does not apply to matters before the Board.'

Mr Shoebridge moved: That the following paragraph 2.106 and Recommendation 3 be omitted:

'The committee also notes that a number of inquiry participants referred to the recommendations made by the Federal Parliamentary Joint Committee on Human Rights in its report for the inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth). The committee agrees, in particular, with Recommendation 9 in this report, which aims to raise the threshold required to lodge a complaint and places the onus on the complainant to demonstrate an act of unlawful discrimination. The basis of this is that any unmeritorious or ill-conceived complaints can be dismissed at an earlier stage of the process. The committee recognises that this would also assist the President in making a determination to decline a complaint if it is found to be frivolous, vexatious or misconceived. The committee therefore recommends that section 89 of the Anti-Discrimination Act 1977 be amended to be consistent with Recommendation 9 of the Parliamentary Joint Committee on Human Rights.

Recommendation 3

That the NSW Government amend section 89 of the Anti-Discrimination Act 1977 to provide that:

- the complainant must allege an act or omission which, if true, could constitute an unlawful discrimination or vilification
- the complainant must set out, as fully as practicable, the details of the alleged acts, omissions or practices
- it must be reasonably arguable that the alleged acts, omissions or practices constitute unlawful discrimination or vilification.'

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mr Shoebridge.

Noes: Mr Borsak, Mr Khan, Mrs Maclaren-Jones, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mrs Ward: That Recommendation 3 be amended by:

a) omitting 'the NSW Government amend section' and inserting instead 'the NSW Government consider amending'

b) omitting 'the complainant must allege an act or omission which, if true, could constitute an unlawful discrimination or vilification'

c) omitting 'the complainant must set out, as fully as practicable, the details' and inserting instead 'the complainant must set out reasonable details'

d) omitting 'it must be reasonably arguable that the alleged acts, omissions or practices constitute unlawful discrimination or vilification'.

Chapter 3

Mr Shoebridge moved: That the following paragraph 3.81 be omitted:

'The committee notes again its concern that the complaints process is able to be misused, potentially wasting the Boards and respondents time and resources. As noted in the previous chapter, the committee is concerned that claims involving parties in other jurisdictions or acts of unlawful discrimination occurring elsewhere are being investigated in New South Wales. The committee is also concerned that people are making complaints when they are not even personally affected by the alleged discrimination. We also question whether respondents are receiving the same level of assistance as complainants through the process.'

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mr Shoebridge.

Noes: Mr Borsak, Mr Khan, Mrs Maclaren-Jones, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.81 be amended by inserting 'solely' before 'involving parties in other jurisdictions'.

Mr Shoebridge moved: That the following new paragraphs be inserted after paragraph 3.81:

'Many of these proposed amendments supported by proponents of the Bill would have quite distinct negative consequences for claimants and the overall jurisdiction. Removing s88B for example would seriously limit the capacity for an employee who had been subject to discriminatory conduct at the workplace if that employee had also made a workers compensation claim that included in part reference to the discriminatory conduct. Given the entirely different nature of the remedies in the two statutory schemes we should not add to the existing legal complexity by placing further arbitrary bars on remedies.

While a minority of stakeholders expressly sought to limit the Board's jurisdiction to address vilification complaints by requiring that any complainant must have suffered a personal detriment, much of this discussion failed to engage with the existing legal limitation in section 88 of the Act. The law currently mandates that a vilification complaint can only be made by a person that has (or claims to have and there is no good reason to doubt that claim) the characteristic that was the ground for the conduct that constitutes the alleged contravention. There was no persuasive evidence before the Committee to further limit this jurisdiction.'

Mr Khan moved: That the motion of Mr Shoebridge be amended by omitting 'There was no persuasive evidence before the Committee to further limit this jurisdiction.'

Amendment of Mr Khan put and passed.

Original question of Mr Shoebridge, as amended, put and passed.

Mr Shoebridge moved: That the following paragraph 3.84 and Recommendation 5 be omitted:

'Specifically, the committee recommends that either as part of the review in Recommendation 4, or separately, the NSW Government consider a number of potential amendments to the Anti-Discrimination Act 1977 to improve the complaints handling process, as outlined below.

Recommendation 5

That the NSW Government consider potential amendments to the Anti-Discrimination Act 1977 to ensure that:

- a claim must be limited to New South Wales only
- a person making a complaint of vilification is to have suffered a personal detriment, under section 88
- both the complainant and respondent are provided with assistance by the President to make or respond to a complaint, under section 88A
- the President be required 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 at least 14 days' 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).'

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mr Shoebridge.

Noes: Mr Borsak, Mr Khan, Mrs Maclaren-Jones, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That Recommendation 5 be amended by omitting 'a claim must be limited to New South Wales only' and inserting instead 'a claim must have a material connection to New South Wales'.

Mrs Ward moved: That Recommendation 5 be amended by omitting 'a person making a complaint of vilification is to have suffered a personal detriment, under section 88'.

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mrs Maclaren-Jones, Mr Shoebridge, Mrs Ward.

Noes: Mr Borsak, Mr Khan.

Question resolved in the affirmative.

Mrs Ward moved: That Recommendation 5 be amended by omitting 'the President be required to refuse to accept' and inserting instead 'the President be allowed to refuse to accept'.

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mrs Maclaren-Jones, Mr Shoebridge, Mrs Ward.

Noes: Mr Borsak, Mr Khan.

Question resolved in the affirmative.

Mrs Ward moved: That Recommendation 5 be amended by omitting 'give a complainant at least 14 days' notice' and inserting instead 'give a complainant reasonable notice'.

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mrs Maclaren-Jones, Mr Shoebridge, Mr Khan, Mrs Ward.

Noes: Mr Borsak.

Question resolved in the affirmative.

Mr Latham left the meeting.

Mr Shoebridge moved: That the following paragraph 3.85 be omitted:

> 'Finally, in terms of the Bill before us, the committee recommends that the Legislative Council proceed to debate the Anti-Discrimination Amendment (Complaint Handling) Bill 2020, and that the committee comments and concerns identified by stakeholders as set out in this report be addressed during debate in the House.'

Question put.

The committee divided.

Ayes: Mr Buttigieg, Ms Jackson, Mr Shoebridge.

Noes: Mr Borsak, Mr Khan, Mrs Maclaren-Jones, Mrs Ward.

Question resolved in the negative.

Mr Shoebridge moved: That Recommendation 6 be omitted:

'**Recommendation 6**

That the Legislative Council proceed to debate the Anti-Discrimination Amendment (Complaint Handling) Bill 2020, and that the committee comments and concerns identified by stakeholders as set out in this report be addressed during debate in the House.'

Question put.

The committee divided.

Ayes: Mr Shoebridge.

Noes: Mr Borsak, Mr Buttigieg, Ms Jackson, Mrs Maclaren-Jones, Mr Khan, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That:

- The draft report as amended be the report of the committee and that the committee present the report to the House;
- The transcripts of evidence, submissions, answers to questions on notice, and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- Upon tabling, all unpublished transcripts of evidence, submissions, answers to questions on notice, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- the report be tabled at 9.30 am, Friday 18 September 2020;
- The Chair to advise the secretariat and members if they intend to hold a press conference, and if so, the date and time.

5. Next meeting

The committee adjourned at 10.57 am, until Wednesday 28 October 2020, Firearms Bill inquiry public hearing.

Sarah Dunn
Clerk to the Committee

Appendix 4 Dissenting statements

From Mr David Shoebridge MLC, The Greens

This report does not reflect the balance of the evidence heard by the committee, nor the best available expert information. There is a very real danger posed by this Bill that it will significantly limit access to remedies for people and communities who are being seriously discriminated against. In fact that is the Bill's clear intention. This Parliament should be working to ensure the vulnerable are protected and their rights are protected and expanded, not that the powerful are free from consequences for their actions.

It cannot be said on the evidence the committee heard that the current scheme is 'open to abuse' in any systemic way. Likewise the speculation that the courts are being clogged up by these matters or that there is forum shopping in NSW are not supported by the facts. As the Greens' representative on the committee I sought to amend this report to more accurately reflect the evidence received. While some important amendments were agreed to, the final report still proposes to limit access to justice. I note that the Greens were the only ones to bring substantive amendments to this final report, a disappointing lack of engagement and solidarity on this critical issue from Labor and the Government.

The unstated assumption behind this report is that remedies for discrimination are the problem, rather than discrimination itself. This report now forms part of a pattern of troubling interventions by the conservative elements in this committee and Parliament.

Whether it is in workplaces, public spaces or this Parliament we must take discrimination seriously. Those in the community who are racially vilified, subject to homophobic or transphobic slurs or ableist treatment should know we have their back. As a Greens MP I will not endorse this report because it fails to deliver on this commitment.

Many of the changes advocated by the proponents of the bill would have distinct negative consequences for claimants and the overall jurisdiction. If they become law they will make it harder to get access to justice and remedies.

One sensible amendment which came from the evidence before the committee (not the Bill) is to extend the Vexatious Proceedings Act to include matters before the Board. This would allow the President to request the Attorney General bring proceedings in the Supreme seeking an order under that Act. That recommendation has genuine merit.

David Shoebridge
Greens MP, 15 September 2020