



1 July 2020

The Hon Robert Borsak MLC
C/o Ms Tina Higgins
Director Committees
NSW Legislative Council

By email: portfoliocommittee5@parliament.nsw.gov.au

Dear Mr Borsak,

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

I refer to the hearing for the inquiry into the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (the Bill)* on 11 June 2020.

Question on Notice 1: Further evidence as to how discrimination law tests can be improved

I undertook to provide the Committee with further evidence as to how discrimination law tests could be improved.

Answer to Question on Notice 1

I refer the Committee to the following documents, which can be accessed by clicking the hyperlinks:

- National Association of Community Legal Centres, Submission to the Attorney General's Department, Commonwealth of Australia, *Consolidation of Anti-Discrimination Laws Discussion Paper* (1 February 2012) <<https://www.klc.unsw.edu.au/sites/default/files/documents/12%20sub%20NACLC%20-%20AGD%20-%20Discrimination%20Consolidation%20Project%20%281%29.pdf>>
- National Association of Community Legal Centres and Kingsford Legal Centre, Submission No 334 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (21 December 2012) <<http://www.aph.gov.au/DocumentStore.ashx?id=6c2d1c4b-0b74-4f62-b7e4-0da3f2edab03>>

Question on Notice 2: Section 46PH of the *Australian Human Rights Commission Act 1986 (Cth) (AHRCA)*

I took a question on notice as to what the downside would be of implementing section 46PH of AHRCA into NSW law.

Answer to Question on Notice 2

Section 46PH includes a discretionary provision in relation to the termination of the complaint by the President, section 46PH(1), which can be exercised at any time. This provision is similar to the operation of section 92 under the *Anti-Discrimination Act 1977* (NSW) (**ADA**).

However, section 46PH(1B) includes a mandatory provision that the President must decline complaints if the President is satisfied that 'the complaint is trivial, vexatious, misconceived or lacking in substance'. Section 46PH(1D) provides that the mandatory termination of a complaint may occur at any time. This is more limited in scope than the broader provision of section 46PH(1) which allows for discretion as to whether the complaint is terminated.

Section 46PH(1B) has an important safeguard that the proposed changes to section 89B do not in that the circumstances in which the power can be exercised are limited and that the President retains broader discretion under section 46PH. The provisions also allow important redress to the Court if the President exercises this authority under section 46PH(1B). It is important to note that the proposed changes under section 89B and section 92 severely limit oversight by preventing an application to the NSW Civil and Administrative Tribunal (**NCAT**).

In response to the question therefore, I recognise that section 46PH(1B) requires mandatory termination but the circumstances in which that can occur are far more limited than the current proposed changes to section 89B. It also has an important safeguard missing from the current section 89B proposal in that it provides redress for oversight by a Court. This would be severely limited under section 89B and it is desirable to ensure that meritorious complaints are not terminated prematurely.

It is our view that the President of the Anti-Discrimination Board already has powers that are similar to those in section 46PH(1). It is in our view not desirable for human rights legislation to restrict access to remedies at the earliest stage.

Discrimination law is complex, perpetrators often hold critical evidence and people who need legal help are not able to get it. As a result, it can be difficult or impossible for people who have experienced discrimination to present a complaint in the most legally favourable light from the outset of a case.

If I can be of further assistance to the Committee, please contact me at

Yours Faithfully
KINGSFORD LEGAL CENTRE

Emma Golledge
Director