

Submission
No 22

INQUIRY INTO ANTI-DISCRIMINATION AMENDMENT (COMPLAINT HANDLING) BILL 2020

Organisation: Institute for Civil Society

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Submission regarding the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

25 April 2020

Committee Secretary
Portfolio Committee No. 5 – Legal Affairs
Legislative Council
Parliament House, Macquarie St
Sydney NSW 2000

The Institute for Civil Society (ICS) is a social policy think tank which seeks to:

1. Promote recognition and respect for the institutions of civil society which sit between the individual and the State such as clubs and associations, schools, religious bodies, charities and NGOs.
2. Promote recognition and protection of traditional rights and freedoms such as freedom of association, freedom of expression and freedom of conscience and religion.
3. Promote a sensible and civil discussion about how to balance competing rights and freedoms.

ICS offers the Committee the following short response to the “Anti-Discrimination Amendment (Complaint Handling) Bill 2020” (the Bill). We can provide more detail if the Committee wishes at a later date.

The ICS considers the Bill is sound in its intentions of remedying the clear problem 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. Mr Latham in his second reading speech for the Bill gave examples of the acceptance by the Board of over 35 repeated complaints by a serial complainant against the same respondent over essentially the same disagreement about sexual morality based on religious beliefs. That track-record and the example of complaints

against Mr Sunol shows that successive Presidents of the Board have not been appropriately exercising the discretion to decline complaints or that the grounds for so doing are too narrow. This failure has led to the NSW anti-discrimination jurisdiction being used for witch-hunts in the culture wars and, allegedly, to some complainants enriching themselves by pressuring respondents to pay them to withdraw unmeritorious complaints so the respondent can avoid the legal costs and time and media criticism. Whatever view members of the Committee may take of the underlying debate about sexual morality, 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.

We support the Bill's proposals to broaden the grounds on which unmeritorious and vexatious complaints may be declined or later rejected by the President and the Board and by NCAT. And we support Bill's proposals to require that the President "must" rather than "may" decline or reject complaints on those expanded grounds. We have not had time to prepare comments on the detailed drafting of the amendments but strongly support the thrust of them.

While our comments here will be limited, we do wish to draw the attention of the Committee to the bipartisan approach taken to a similar reform in the Federal Parliament.

The *Human Rights Legislation Amendment Act 2017* provided for similar reforms to the workings of the Australian Human Rights Commission. The Commonwealth Parliamentary Joint Committee on Human Rights 'Inquiry into Freedom of Speech in Australia' reached unanimous cross-party agreement on a range of very precise recommendations for reforms to the procedure of the Australian Human Rights Commission in dealing with complaints, resulting in amendments to the *Human Rights Commission Act*.

In many ways, the amendments to the Federal *Act* went further than the amendments set out this Bill to deter vexatious and unmeritorious complaints of discrimination and vilification. A number of the Joint Committee's recommendations are relevant and received bipartisan support. We urge the Committee to consider the following recommendations as a way of strengthening the achievement of the goals behind the Bill.

We recommend the Committee consider the following recommendations of the Commonwealth Parliamentary Joint Committee on Human Rights' report.¹

Recommendation 5 - 3.127 The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide that when there is more than one respondent to a complaint, the Australian Human Rights Commission must use its best endeavours to notify, or ensure and confirm the notification of, each of the respondents to the complaint at or around the same time. [It is not required that the respondent be notified at the time of making a complaint in NSW]

Recommendation 7 - 3.129 The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to empower the Australian Human Rights Commission to offer reasonable assistance to respondents consistent with assistance offered to complainants.

Recommendation 9 - 3.137 The committee recommends that section 46P of the *Australian Human Rights Commission Act 1986* be amended with the following effect:

- i. complaints lodged be required to 'allege an act which, if true, could constitute unlawful discrimination';
- ii. a written complaint be required 'to set out details of the alleged unlawful discrimination' sufficiently to demonstrate an alleged contravention of the relevant act; and
- iii. a refundable complaint lodgement fee be lodged with the Australian Human Rights Commission prior to consideration of a complaint (with consideration given to waiver arrangements similar to those that are in place for courts).

Recommendation 11 - 3.139 The committee recommends that, where the conduct of the complainant or practitioner has been unreasonable in the circumstances, the Australian Human Rights Commission be empowered to make orders, on a discretionary basis, about reasonable costs against practitioners and complainants in order to prevent frivolous claims.

Recommendation 12 - 3.141 The committee recommends that the grounds for termination in section 46PH(1) of the *Australian Human Rights Commission Act 1986* be expanded to include a power to terminate where, having regard to all the circumstances of the case, the President is satisfied that an inquiry, or further inquiry, into the matter is not warranted

Recommendation 13 - 3.142 The committee recommends that the President's discretionary power under section 46PH of the *Australian Human Rights Commission Act 1986* to terminate complaints be amended so that the President has an obligation to terminate a complaint if the President is satisfied that it meets the criteria under section 46PH.

Recommendation 14 - 3.143 The committee recommends that section 46PH(1)(a) of the *Australian Human Rights Commission Act 1986* be amended to clarify that the President must consider the application of the exemptions in section 18D to the conduct complained of when determining whether a complaint amounts to unlawful discrimination.

¹ Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia: 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)* (Canberra: Parliament of Australia, 2017), available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Report/a03. Accessed 25 April 2020.

Recommendation 15 - 3.144 The committee recommends that section 46PH of the *Australian Human Rights Commission Act 1986* be amended to include a complaint termination criterion of 'no reasonable prospects of success'.

Recommendation 16 - 3.146 The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide for a process whereby a respondent to a complaint can apply to the President for that complaint to be terminated under section 46PH of the *Australian Human Rights Commission Act 1986*.

Recommendation 18 - 3.153 The committee recommends that section 46PO of the *Australian Human Rights Commission Act 1986* be amended to require that if the President terminates a complaint on any ground set out in section 46PH(1)(a) to (g), then an application cannot be made to the Federal Court or the Federal Circuit Court unless that court grants leave.

3.154 This amendment should include that:

- the onus for seeking leave rests with the applicant; and
- the Australian Human Rights Commission provide to the Federal Court or Federal Circuit Court a certificate detailing its procedures and reasons for termination of the complaint as part of the process of seeking leave.

Recommendation 19 - 3.155 The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to make explicit that, subject to the court's discretion, an applicant pay a respondent's costs of future proceedings if they are unsuccessful or if the respondent has, at any earlier point, offered a remedy which is at least equivalent to the remedy which is ultimately ordered.

Recommendation 21 - 3.157 The committee recommends that a plaintiff/complainant, following the termination of a complaint by the Australian Human Rights Commission, who makes an application to the Federal Court or Federal Circuit Court under section 46PO of the *Australian Human Rights Commission Act 1986*, in relation to a complaint that in whole or in part involves Part IIA of the *Racial Discrimination Act 1975*, be required to provide security for costs subject to the court's discretion

These recommendations were agreed upon across the political spectrum, demonstrating that a similar approach to the problem is possible in New South Wales. We urge the Committee to look closely at the Joint Committee's findings and recommendations, as well as the relevant amendments.

The proposed amendments in the Bill to the *Anti-Discrimination Act 1977* go some way to providing a fairer system of handling vilification and discrimination complaints. We are supportive of such a move and would be pleased to provide further detail to the Committee at a later time on this matter.

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