Submission No 23

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

Organisation: Australian Christian Lobby

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Portfolio Committee No. 5 - Legal Affairs

Legislative Council
Parliament of New South Wales
Macquarie Street SYDNEY NSW 2000

Dear Chair,

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

The Australian Christian Lobby (**ACL**) welcomes the opportunity to provide this submission to Portfolio Committee No. 5 - Legal Affairs for its inquiry into the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (**Bill**). ACL would be happy to appear before the Legal Affairs Committee to speak in support of these submissions.

Executive Summary

This Bill is a good start. The Bill will amend the complaints handling provisions of the *Anti-Discrimination Act 1977* (NSW) (**ADA**). ACL supports the Bill but also recommends certain changes.

ACL proposes an alternative to the deletion of section 93A of the ADA. ACL's proposal would preserve appeal rights but put in place costs disincentives for vexatious claimants in order to prevent them referring worthless claims.

ACL also considers that more changes to the Bill are needed to prescribe a more robust complaint handling procedure for the Anti-Discrimination Board (**ADB**), its suggestions are as follows:

- amending the definition of "public act" to clarify that such acts (which give rise to vilification claims) must originate in NSW or be carried out in NSW;
- requiring a higher threshold of standing for applicants to make claims – they must be directly affected by alleged conduct;

- requiring a complaint lodgement fee to be paid by complainants which they lose if the complaint is decided not to have substance;
- requiring complaints to contain sufficient information about the conduct, the alleged breach and the damage suffered by the complainant otherwise the complaint is not accepted;
- requiring the ADB to provide timely notice to respondents of complaints received;
- providing a process for respondents to make early application to the ADB for a complaint to be declined for lacking substance or for being vexatious or malicious;
- requiring the ADB to bundle complaints into one proceeding where the complainant lodges multiple complaints against a single respondent, and to decline claims which are substantive duplications of earlier claims;
- limiting the assistance that ADB can give to a complainant so that prolific complainants are not able to receive assistance;
- enabling the ADB to provide equal assistance to respondents as to complainants where circumstances allow; and
- requiring the ADB to terminate a complaint where a claim otherwise has no reasonable prospect of success or where the ADB is satisfied that further inquiry into the matter is not warranted having regard to all of the circumstances of the case.

ACL's detailed submissions and the reasons for those submissions are set out below.

About ACL

Australian Christian Lobby's vision is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just, and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With more than 170,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

ACL Support for Bill

The ACL supports the Bill and agrees with the intended purpose of the Bill to provide better regulation of the Anti-Discrimination system in NSW and to put a stop to the proliferation of worthless claims that clog up the capacity of the ADB and the NSW Civil and Administrative Tribunal (NCAT). ACL would like to propose an alternative change to section 93A of the ADA, which is considered in more detail below. This submission will also suggest some other areas that the Bill should address with some additional drafting.

In particular, the ACL supports the key proposed changes of the Bill including:

- The prohibition of claims against non-residents of NSW. The ADA has clearly been used to pursue residents out of State. Not only is this unjust, but the ensuing explosion of case law around those claims has cost the NSW taxpayer enormous sums of dollars for absolutely no benefit to the State;
- The requirement for the President to decline a complaint where "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". This will hopefully prevent the targeting of complaints against those with mental impairment, something which has occurred in the past.
- The requirement for the ADB to decline hopeless claims. The ADB has been an ineffective gatekeeper of claims and has allowed many claims that are clearly worthless. The Bill effectively requires the ADB to decline claims that clearly have no merit, and which are being pursued for purposes other than protection of legitimate interests.

Alternative Proposal for Removal of Section 93A

The ACL urges caution on removing section 93A of the ADA allowing complainants to require the ADB President to refer a matter that has been declined to the NCAT. The ACL considers that there needs to be a 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.

An example of how this mechanism can be weaponised is illustrated by the complaint against high profile Rugby star Israel Folau.

In late 2019, a complaint was lodged with the ADB accusing Israel Folau of "homosexuality vilification" for both his much-publicised Instagram posts (for which he had been sacked by Rugby Australia) and a much-publicised video

sermon. The sermon discussed the recent bushfires, and the passing of legislation including changes to the Marriage Act.

The Australian Christian Lobby has supported Israel Folau's freedom to express his beliefs on social media as a test case for other Australian Christians.

The complaint against Israel Folau was lodged with the ABD after the legal case between Folau and Rugby Australia had already been settled out of court.

The complaint was initially accepted in December last year but was declined mid-April 2020 by the ADB on the grounds it was "vexatious".

In an action which directly illustrates the way section 93A can be used as a weapon, the complainant has now written to the Anti-Discrimination Board seeking his complaint be referred to the NCAT.

In other words, the complainant will now pursue Folau in the NCAT for the same matter that was declined by the Board.

The fundamental flaws of the ADA are evident in the fact that the case was even initially accepted by the ADB despite no material detriment to the complainant. Section 93A of the ADA gives the complainant a second chance to go after Folau, all at no cost.

ACL agrees that section 93A of the ADA needs change to disincentivise worthless claims like that against Israel Folau. However, to remove section 93A would remove important oversight by the NCAT and higher courts over the ADB. It would also put legitimate claims at risk of being rejected at the first hurdle with no power for claimants to contest the decision. It vests absolute power of gatekeeping in the President of the ADB.

The ACL suggests that a better way to discourage worthless claims being referred to NCAT by complainants is to retain s93A but to allow a respondent to recover legal costs (on an indemnity basis) if the NCAT confirms a decision of the President under sections 87B(4) or 92 of the ADA that a claim is lacking in substance or is vexatious and malicious.

Provision should also be made to require a complainant to provide security for costs to the NCAT where requiring referral of a claim to NCAT where the ADB has determined that it is vexations and malicious or lacking in substance.

With a requirement to provide security and the threat of becoming liable for indemnity costs, vexatious claimants will be cautious about referring claims

that have no substance, and claimants who consider they have legitimate claims that have merit can require those matters to be heard by NCAT. ACL considers that such a provision would also effectively stop worthless claims being advance.

The complaint against Folau raises serious questions around the freedom of NSW residents to freely express their religion. There is a genuinely held concern by many of ACL's supporters that it is getting harder to publicly express one's faith. Until NSW anti-discrimination law is amended to shut the gate on vexatious complaints, innocent Australians will be pursued by activists with a political agenda.

Additional Suggested Amendments

Reform of the ASB complaint handling process is long overdue. A whole discrimination industry has arisen which clogs up the NSW legal system and utilises the ADB for the purpose of suppressing freedom of speech and to promote activist causes and political campaigns. For far too long, vexatious claims have been allowed to be brought before the ADB which cause undue costs, stress, and loss to undeserving everyday Australians. While the changes proposed by the Bill are supported, we note that these changes are modest.

In addition, Because of this, the ACL considers that further amendments to the Bill are necessary. It is important to highlight that because lodging a formal complaint and undertaking a conciliation conference at the ADB, is free and a subsequent referral to the NCAT is also free, the potential for abuse of the process is real.

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.

It is obvious to any keen observer that there needs appropriate checks and balances to prevent the acceptance of complaints that are frivolous, vexatious, misconceived or lacking in substance.

The issues that this bill seeks to address are bi-partisan issues. Freedom is an issue that should concern all political parties and divides.

The second reading speech of the Hon. Mark Latham MLC highlighted several individuals who have been at the receiving end of these complaints including Bernard Gaynor and Israel Folau.

Bernard Gaynor, a Queensland resident, has incurred hundreds of thousands of dollars in legal fees with more than 34 such complaints lodged against him. The impact of these claims has been financial ruin rather than the obtaining of justice for a legitimate complaint.

The financial costs of this vexatious litigation enabled by the current arrangements are not only borne by the respondents but also by the taxpayer who must foot the bill for the draining of important legal resources.

These proceedings may have been avoided if there was effective gatekeeping of vexatious claims by the ADB and the NCAT at the beginning of the process.

For these reasons, the ACL recommends the following additional changes to the Bill:

1. “Public Act” definition. The definition of “public act” in respect of any vilification under the ADA (e.g. homosexual vilification, transgender vilification and HIV/AIDS vilification) to clarify that such acts must originate in NSW or be carried out in NSW to be public acts that can be the subject of a vilification complaint. This would put a stop to activists scouring remote corners of the internet to find offensive comments from people in distant corners of Australia to take action about. It will also expressly reflect in the ADA what the NCAT has decided in the case of statements made by residents of Queensland.

2. Higher Threshold for Standing. The Bill should require a higher threshold of standing for complainants. Currently, virtually anyone can make a complaint under the ADA no matter how remote they are from the respondent or how distant they are from actual threat or harm by the conduct of the complainant. Especially for vilification actions, complainants should be required to include in their complaint evidence that the conduct of the respondent has a direct effect on them individually or as a member of a defined group (not merely as persons who merely have a particular attribute such as homosexuality, transgenderism or AIDS/HIV status). Many other parties have been seeking a raising of the threshold for claimants to be able to take claims for many years.

3. Mandatory Bundling of Actions. The ADB should be required to rationalise complaints where there are multiple identical complaints. The ADB should be required to bundle complaints into one proceeding where the complainant lodges multiple complaints against a single respondent and the ADB should also be given the power to dismiss complaints where multiple subsequent complaints are lodged that are so similar in allegations to an earlier complaint that another complaint

will add no value. This will stop unnecessary reproduction and the current practice of undue pressure being placed on respondents by ambushing them with a huge volume of similar complaints, each of which are duly processed and sent out by the ADB without rationalisation. This needs to stop.

The ACL also commends some of the recommendations made at a federal level by the Commonwealth Parliamentary Joint Committee on Human Rights for reform of the Australian Human Rights Commission complaints handling procedure. These recommendations can be imported into the ADA without any required modification. By enacting these recommendations, it will bring the NSW ADA regime in line with the Federal and State regimes and will discourage activists taking advantage of the lax gateways and low bar that currently govern the handing of complaints by the ADB and the NCAT.

It is important to note that almost all the recommendations of the Committee were unanimous and had bipartisan support. This reflects that all sides of politics are legitimately concerned with ensuring that discrimination regimes are efficient, just, and not used for political purposes. ACL would strongly recommend that the Bill be amended to take into account these recommendations from 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)*:

1. Lodgement Fee. Complaints should be required to pay a refundable lodgement fee for complaints, with suitable provisions for waiver that mirror those used in other Courts for lodgement fees. This will stop multiple complaints, encourage complainants to bundle their own complaints and will allow the ADB to recoup the administrative costs of processing worthless claims.

2. Higher Standard for Complaints. Currently, complainants to the ADB can lodge complaints that are ambiguous, poorly constructed, vague and unclear and containing little detail of who is being complained about, what the details of the alleged conduct is and the reasons why that conduct breaches the ADA. The ADB should be given the power to require complainants to lodge complaints to demonstrate conduct that, if true, could constitute a breach of the ADA and which contain sufficient details of the allegations including how the complainant is directly affected. Any complaints which do not meet that threshold should not be accepted or processed.

3. Notice to Respondents. The ADA should require the ADB to provide timely notice to respondents of complaints received and should give respondents the right to provide the ADA with their views about why

the complaint should be declined under section 89B of the Act. This will give the ADB the ability to have at hand the best information on which to make its initial assessment of the complaint and maximise its ability to identify legitimate claims at an early stage and to weed out worthless and vexatious claims.

4. Respondent Rights. As set out above, not only should respondents receive notice of complaints but the ADA should also provide a process for respondents to apply for the complaint to be terminated for lacking substance and to provide relevant information to the ADB at first instance;

5. Limitation of Assistance. The ADA gives the ADB broad powers to assist complainants. ACL sees some value in providing this assistance to complainants with single complaints about substantive wrongs and where the complainant has limited assistance and limited financial capacity. However, the ADA should limit assistance so that it cannot be given to a serial complainant. There should be sensible limitations on the provision of assistance to prevent the practice of the ADB subsidising and equipping activist campaigns with taxpayer funds.

6. Equal Assistance. Currently, the ADB does not have the power to assist respondents. In many discrimination cases, this may be appropriate. However, ACL is aware of activist complainants using complaints as a way to target vulnerable Australians and to attempt to extort settlements of vexatious claims. ACL is aware of many Australians who have felt intimidated and coerced towards settlements when faced with potential claims under the ADA. The ADA should be amended to allow the ADB to provide assistance to both respondents and complainants so that Australian requiring the ADB to provide equal assistance to respondents as to complainants, rather than the current system, which is very one sided.

7. Additional Grounds for Termination. Sections 89B (2) and 92(1) of the ADA should contain additional amendments requiring the ADB to terminate a complaint where:

   (a) the ADB considers that the claim has no reasonable prospect of success; or

   (b) where the ADB is satisfied that further inquiry into the matter is not warranted having regard to all of the circumstances of the case.

   The addition of these powers to dismiss complaints will allow the President of the ADB to decline a complaint where it doesn't fit into one of the narrow categories already in these sections but where there are good reasons for the complaint not to be progressed.

Conclusion

As can be seen, the ACL commends the Bill and welcomes a review of the ADA, but ACL also proposes further amendments to the complaints handling regime of the ADA in order to put a stop to worthless claims lodged on political grounds which seek to trample on freedom of speech, conscience and religion.

The ACL considers that the Bill is a good start to the review of discrimination legislation but is not sufficient. We would strongly urge that a more far-reaching review and overhaul of the NSW Anti-discrimination Board and discrimination sector should be undertaken to substantially reduce the scope for discrimination legislation to be used for political activism and to suppress fundamental freedoms of speech, conscience and belief. There is very little evidence that the existing discrimination regime provides any real benefit to complainants or contributes to making Australia a just and civil society. We look forward to working with the Committee to facilitate changes to the Anti-Discrimination Act in NSW that will put a stop to the abuse of the system that has been tolerated for too long.

Sincerely,

Kieren Jackson

Director | NSW

Australian Christian Lobby