Submission No 71

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

Organisation: Intellectual Disability Rights Service Inc.

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The Director
Portfolio Committee No. 5
Parliament House
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Submission on the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

About the Ability Rights Centre

The Ability Rights Centre (ARC) is a community legal centre operated by the Intellectual Disability Rights Service Inc. ARC works with and for people in NSW living with intellectual or other cognitive disability. We provide legal assistance, rights education and group programs, and support for people with disability engaging with the Disability Royal Commission or appealing decisions of the National Disability Insurance Agency.

We are pleased to make the following submission in relation to the Bill. We request that our submission be published in full on the Committee's website, including our name.

We note the wording of the Overview of the Bill, namely:

"The object of this Bill is 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 order to achieve its object the Bill firstly removes the discretion to decline complaints under sections 89B and 92 of the *Anti-Discrimination Act 1977* (the Act), and states instead that the President "must" decline complaints if any of the grounds, as set out, exist. Secondly, the Bill removes sections

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93A and 96(1) and so removes the existing right to have the declined complaint reviewed by the NSW Civil and Administrative Tribunal (NCAT).

People with cognitive disability are vulnerable to being discriminated against, and in our experience they need protection. They have difficulty articulating their problems and often do not have any family supporters, friends, carers, advocates, or access to legal services, to help them. Mostly, they wish to be respected and to have their complaints taken seriously. The Anti-Discrimination Board (ADB) application form is simple to complete and the grounds of a complaint can also be stated in simple terms. The ADB accepts most of the complaints that ARC makes on behalf of its clients. Our clients can then have a meeting managed by an independent person at the ADB to discuss their complaint with the other party. Generally, our clients would like the other party to apologise to them and to agree to stop the discriminatory conduct. Our clients are usually satisfied with the ADB's processes.

Case Study

The applicant made a very simple complaint to the ADB and attached a brief doctor's letter about his intellectual disability. The applicant hoped to take part in mediation to work out an arrangement for accessing the services being refused to him. Unfortunately, the ADB dismissed the complaint under s92(1) on the grounds that it was lacking in substance.

The applicant asked the ADB case manager why the complaint had been dismissed because in the past the ADB had allowed a similar complaint about another service to go to mediation where it was settled. The case manager replied that the other complaint had been handled by another person at the ADB.

We helped the applicant to have the complaint referred to NCAT under s93A, and we also helped him to prepare a detailed statement, and provide a more detailed medical report for the hearing to seek the leave of the tribunal to proceed under s96.

At the hearing the tribunal noted that it has an unfettered discretion to grant leave for a complaint to proceed, which is not confined to the grounds on which the ADB declined the complaint, although the tribunal may have regard to those grounds. After considering all the evidence the tribunal decided that the complaint had substance and it was fair and just for the

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complaint to proceed. Accordingly, leave to proceed with the complaint under section 96 was granted.

We submit that the Act serves a beneficent and curative purpose for vulnerable people and therefore, in accordance with legal principles, it is desirable for the Act to be interpreted broadly to allow possible claims to be accepted, settled, or heard. The Act, in particular ss89B, 92, 93A, and 96, and the current approach of the ADB, achieves this purpose without the need to be amended.

The above case study shows that there is a risk of a complaint with substance being declined when an applicant does not have the ability to put the relevant information in his ADB application. Therefore, there is a need for s93A to be retained.

In his second reading speech, the Hon. Mark Latham described s93A as giving the applicant a "second bite of the cherry". We do not agree with Mr Latham because s96 then requires the applicant to prove the complaint has substance before leave is granted to proceed in the NCAT. Therefore, s96 acts as one of the barriers against vexatious or frivolous cases, and there is no need to change the Act as Mr Latham proposes.

Also, most of the matters raised by Mr Latham can be dealt with under the Act without the proposed amendments. For example, section 92(1)a, in summary, gives the ADB the discretion to decline complaints if they are vexatious or frivolous, or lacking in substance, or if another remedy is more appropriate, or if the conduct would not breach the Act, or if another body should deal with the complaint, or if it is not in the public interest, etc, and under s92(1)b, the ADB is given the discretion to decline complaints **for any other reason**. Also, under s102 of the Act, this same discretion to decline complaints has been given to the NCAT. In addition, although usually each party pays their own costs, the NCAT can award costs if the complaint is vexatious or frivolous, misconceived, lacking in substance, or for any other relevant matter (see s60(3)e of the *Civil and Administrative Tribunal Act, 2013*).

We further submit that discrimination cases are complicated because the discriminatory actions often occur when there are no witnesses, the information is often in the hands of the respondent only, and the respondent often provides other reasons for the discriminatory actions. As a result, there may be limited or no direct evidence, and inferences may need to be relied

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upon that can only be drawn from a full consideration of all the circumstances in order to prove that a complaint has substance. It is not practical or desirable that the ADB be expected to scrutinise a complaint to that degree. Instead, it should continue its present approach of allowing complaints to be kept as simple as possible, and then trying to settle them without formal legal proceedings.

Summary of our responses to other matters referred to in the parliamentary second reading speech as supporting the proposed changes

Mr Latham quoted only multiple complaints made by Mr Gary Burns - involving Gary Burns v Bernard Gaynor, Gary Burns v John Christopher Sunol, and Gary Burns v Israel Folau – and complaints made by Henry Collier against Mr Sunol. In these cases, Mr Latham said in summary that the defendants' alleged actions involved the vilification of homosexuals on social media. He also said that Mr Gaynor lived in Queensland, that Mr Sunol had an acquired brain injury, and that Mr Folau was doing an act of religious instruction. He described Mr Burns as a vexatious litigant seeking money, and complained that the Act was being used to harass people for political purposes.

By contrast, ARC helps people with intellectual and other cognitive disabilities to use the complaints procedures under the Act to seek remedies for unfair treatment. If, as in the case study, a person with cognitive disability has made a complaint but provided inadequate supporting material, it is important the complainant have an opportunity to rectify the deficiency – with the help of services such as ours, if necessary – so as to have the chance to achieve a satisfactory solution.

In response to the six changes described at the end of Mr Latham's second reading speech, we submit:

1. These three cases do not justify the removal of ss93A and 96 for the above reasons.
2. If Mr Burns was engaging in "forum shopping", the Act does not need to be amended to stop this practice, see ss92 and 102 referred to above.

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3. The Act does not need to be amended to stop the ADB accepting complaints against people exempt under the Act, because as a matter of law, it has no jurisdiction.
4. Mr Latham stated that: *Fourth, under proposed section 89B (2) (l) the president must decline a complaint if satisfied "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." If a complaint is lodged, the board president should not accept it if it is known to her that the respondent has an intellectual disability, a developmental disorder including an autistic spectrum disorder, a neurological disorder, dementia or a brain injury.* We submit that the degree of cognitive impairment of the respondent, and its relevance in causing the discriminatory action, are important issues for the ADB and the NCAT 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 ADB and NCAT should consider this important issue in dealing with the complaint. As noted above, both bodies have a discretion to decline a complaint **for any other reason**, see ss92 and 102, referred to above.
5. The above three cases do not justify "raising the bar", by changing s89B(2) to make it more difficult for our clients to apply to the ADB. We have given reasons above, related to our client's lack of mental capacity as well as the evidentiary problems in discrimination complaints, to argue that it is fair and just for our clients not to be

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required to show a prima facie case when they apply to the ADB, and therefore section 89B(2) should not be changed.

6. Mr Latham stated that: *Finally, the bill seeks to strengthen the obligations of the President in declining and discontinuing complaints. In relation to sections 89B (2) and 92 (1) it is proposed to change the current, discretionary wording "the President may" to bring it into line with interstate practice, that is, to make a more definitive provision whereby "the President must" follow the requirements of the Act in ruling out complaints.* We submit that the ADB should continue to exercise its **discretion** in relation to the acceptance and investigation of complaints for the reasons given above, and therefore the Act should not be amended as proposed.

Conclusion

We submit, with respect, that the Act should **not** be amended as proposed.

Thank you.

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