Submission No 84

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

Organisation: The Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/ELC/RHas:1886505

30 April 2020

The Hon Robert Borsak MLC
Chair, Portfolio Committee No. 5 – Legal Affairs
Legislative Council, Parliament of NSW
Macquarie Street
Sydney NSW 2000

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

Dear Mr Borsak,

Anti-Discrimination Amendment (Complaint Handling) Bill 2020

Thank you for the opportunity to provide a submission to the Portfolio Committee No.5 – Legal Affairs inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 ("the Inquiry").

The Law Society has concerns about a number of the provisions of the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 ("the Bill"). In this submission, we will outline the provisions of the Bill we have the strongest concerns about.

The Law Society's submission is informed by its Human Rights Committee and Employment Law Committee.

1. General observations

When it was enacted, the *Anti-Discrimination Act 1977* (NSW) ("the ADA") was considered an innovative measure that put NSW ahead of other Australian states in dealing with major areas of discrimination.[1] On introducing the legislation into Parliament, then-Premier the Hon Neville Wran QC stated that "the [Anti-Discrimination] Bill is an attempt, as far as legislation can, to end intolerance, prejudice and discrimination in our community".[2] The ADA's Long Title describes it as "an Act to render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons".[3]

There is evidence that the ADA has contributed to the goal articulated in its Long Title. A review of the ADA by the NSW Law Reform Commission ("NSWLRC") tabled in Parliament in April 2000 found "the Act has been successful in bringing about significant changes to community

[1] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* Vol 2 Report No 92 (1999), 15.
[2] NSW, *Parliamentary Debates*, Legislative Assembly, 23 November 1976, 3337 (Neville Wran).
[3] *Anti-Discrimination Act 1977* (NSW).

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attitudes and behaviour".[4] The 2018-19 Annual Report of the Anti-Discrimination Board of NSW ("ADB"), which administers the ADA, reported that in the year under review the ADB finalised 877 complaints within an average timeframe of 5.4 months per complaint.[5] In addition, the ADB addressed 3,115 enquiries about discrimination, most of which were made by telephone.[6] The ADB also works to prevent discrimination by educating people about their rights and responsibilities under anti-discrimination law through consultations, seminars, community functions, and print and digital publications.[7]

2. Amendment of ss 89B(2) and 92 of the ADA to limit the President's discretion to accept or decline complaints

The Bill seeks to swap the word "may" for "must" at ss 89B(2) and 92 of the ADB. This would have the effect of limiting the President's discretion to determine whether 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. We oppose this amendment for two reasons.

Firstly, in principle we are of the view that barriers to human rights protections in NSW should not be raised without a solid evidence base. The three most recent annual reports prepared by the ADB covering the periods 2016-17, 2017-18 and 2018-19 do not contain any data suggesting a surge in vexatious complaints that are compromising the ADB's ability to fulfil its statutory function in a timely fashion. The most recent detailed review of the ADA, conducted by the NSWLRC and tabled in Parliament in April 2000, made 161 recommendations for reform of the ADA, some of which have since been implemented. None of the recommendations in the NSWLRC review proposed amending the ADA to limit the President's discretion to accept or decline complaints.[8]

Secondly, the ADA, as currently drafted, already provides powers at s 92 to the President to decline vexatious complaints, and these powers are being used in appropriate circumstances. In April 2020, the President of the ADB declined a complaint lodged by Mr Garry Burns against Mr Israel Folau because she was satisfied it was vexatious and "a flagrant abuse of process such that no further actions should be taken". In declining the complaint, the President is reported to have found Mr Burns had not pursued the complaint under the ADA "in order to avail himself of the processes afforded under the ADA but for a collateral purpose, as a means to pressure the respondent to settle with him".[9]

3. Repeal of s 93A of the ADA

The Bill seeks to repeal s 93A of the ADA, which requires the President of the ADB to refer a complaint that has been declined during an investigation to the NSW Civil and Administrative Tribunal ("NCAT"), if requested by the complainant.

In our view, it is appropriate for complainants to retain the ability to request referral of complaints to the NCAT if the President has exercised his or her discretion to decline a

[4] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* Vol 2 Report No 92 (1999); NSW Law Reform Commission, 'Review of the Anti-discrimination Act 1977 (NSW)' (Media release, 17 December 1999).
[5] Anti-Discrimination Board of NSW, *Annual Report 2018-19*, 11.
[6] Ibid 8.
[7] Anti-Discrimination Board of NSW, *Annual Report 2018-19*, 6.
[8] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* Vol 2 Report No 92 (1999).
[9] Julian Drape, 'NSW board declines complaint against Folau' *Australian Associated Press,* 16 April 2020 <https://www.news.com.au/national/breaking-news/nsw-board-declines-complaint-against-folau/news-story/0689b4d1f72de33e13895d81ef103383>.

complaint during investigation. Access to review of government decisions is a key component of access to justice, not a "second bite of the cherry", as suggested in the second reading speech accompanying the Bill.[10] Section 89B(4) of the ADA already limits administrative review rights in respect of decisions by the President to decline complaints; these rights should not be constrained further. We also note that s 96(1) of the ADA provides that the NCAT must grant leave to a complainant who has been referred under s 93A(1) before they can commence proceedings. Section 102 of the ADA also provides the NCAT with discretion to dismiss a complaint at any stage in proceedings for any of the following reasons:

- If the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance; or
- 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
- The Tribunal is satisfied that for any other reason no further action should be taken in respect of the complaint, or part of the complaint.

These provisions ensure that the NCAT's resources will not be consumed by considering unmeritorious or spurious complaints that have been referred from the ADB.

In addition, we query whether there is an adequate policy rationale for the proposed change. There are a relatively low number of complaints referred by the President of the ADB to the NCAT each year, and fewer still proceed to finalisation. In 2018-19, the ADB referred 174 complaints to the NCAT, 37 of which were referred under s 93A.[11] 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.[12] It, is, therefore, questionable whether complaints referred to the NCAT under s 93A can be construed as "eating up scarce resources in the New South Wales legal system", as the second reading speech accompanying the Bill argued.

4. Proposed inclusion of additional reasons requiring the President to decline complaints

The Bill seeks to insert the following new clauses into the ADA after s 89B(2)(e):

> (f) the President is of the opinion that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or
> (g) 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, or
> (h) the subject-matter of the complaint has been dealt with by the President, an authority of the State or the Commonwealth, or
> (i) 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, or
> (j) 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—
> (i) a resident of another State or Territory as evidenced by the individual's address on the electoral roll, and
> (ii) not in New South Wales, or
> (k) the complaint falls within an exception to the unlawful discrimination concerned, or
> (l) 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.

[10] NSW, *Parliamentary Debates*, Legislative Council, 27 February 2020 (Mark Latham).
[11] Anti-Discrimination Board of NSW, *Annual Report 2018-19*, 12.
[12] NSW Civil and Administrative Tribunal, *NCAT Annual Report 2018-19*, 31.

(2A) For the purposes of excluding the application of subsection (2)(j), the onus of establishing that the respondent was in New South Wales lies with the complainant.

Combined with the proposal to change the word "may" to "must" in s 89B(2), these additions would have the effect of 'raising the bar' for complaints to be accepted by the ADB. We are of the view that it is not necessary to limit the ability of the President of the ADB to accept complaints in this manner. As the Legislation Review Committee noted in its report on the Bill, by providing the President "must" decline complaints in these categories, the Bill may impact on the right to protection against discrimination.[13] For example, there may be individuals who have a complaint with merit but are unable to articulate it at the initial stage due to language difficulties, a lack of legal assistance, or a cognitive impairment. 'Raising the bar' for acceptance of complaints would limit these individuals' ability to have their complaint investigated by the ADB to determine if it should proceed.

With regard to proposed ss 89B(2)(f), 89B(2)(g), 89B(2)(h) and 89B(2)(i), these are similarly worded to existing ss 92(1)(a)(i), and 92(1)(a)(iv), and 92(1)(a)(v), which apply at any stage of the President's investigation of a complaint. We do not believe it is necessary to replicate these criteria at the complaint stage, given – as noted elsewhere in the submission – there is no evidence of the ADB being overwhelmed by complaints.

With regard to proposed s 89B(2)(k), we not do believe it is appropriate to compel the President of the ADB to make a determination, at the time a complaint is made, about whether the action complained of is covered by an exception in the ADA. A complaint may not contain sufficient information to allow the President to make an informed decision on the applicability of any exceptions in the ADA. 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.

Proposed ss 89B(2)(l) is highly problematic, as it 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. Proposed s 89B(6) would require that "cognitive impairment" be read broadly, to include "an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia or a brain injury." We are of the view that this provision may unduly limit complainants' access to justice, and is unnecessary in light of the broad discretionary power to the President to decline complaints during investigation at s 92 of the ADA.

5. Proposed inclusion of a definition of "frivolous, vexatious, misconceived or lacking in substance" at ss 89B and 92

The Bill seeks to insert the following clause into the ADA at ss 89B(5):

The President is to consider the following matters before determining that a complaint is frivolous, vexatious, misconceived or lacking in substance—
(a) the number of complaints lodged by the complainant—
(i) in respect of the same respondent, and
(ii) in respect of the same or similar conduct,
(b) 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,
(c) any evidence that the complainant is not acting in the interests of justice.

The Bill seeks to insert the following similar clause into the ADA at 92(3):

[13] Legislation Review Committee, *Legislation Review Digest*, 24 March 2020, No. 11/57, 4.

> The President is to consider the following matters in order to be satisfied that a complaint is frivolous, vexatious, misconceived or lacking in substance—
>
> (a) the number of complaints lodged by the complainant in respect of the same respondent,
> (b) 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,
> (c) any evidence that the complainant is not acting in the interests of justice.

The Law Society is of the view that the proposed clauses are unnecessary. Under s 92 of the ADA, the President already has discretion to decline a complaint at any stage during its investigation for a number of reasons, including if "the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance". These terms are undefined in the ADA, however they are not novel legal language. As noted at 2 above, the discretionary powers available to the President of the ADB to dismiss a complaint if it is "frivolous, vexatious, misconceived or lacking in substance" are being utilised in practice for appropriate matters. We therefore cannot identify any benefit that proposed ss 89B(5) and 92(3) would deliver.

Thank you for the opportunity to contribute to the Inquiry. Questions may be directed in the first instance to Andrew Small, Policy Lawyer, at or

Yours sincerely,

Richard Harvey
President