Submission No 124

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

Organisation: Australian Discrimination Law Experts Group

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Submission by the Australian Discrimination Law Experts Group

to the

New South Wales Legislative Council Portfolio Committee No. 5 – Legal Affairs

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

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1. Australian Discrimination Law Experts Group

We make this submission on behalf of the undersigned members of the Australian Discrimination Law Experts Group (ADLEG), a group of legal academics with significant experience and expertise in discrimination and equality law and policy. This submission focuses on the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 ('the Bill').

In summary, we recommend that the Bill be rejected in its entirety.

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by emailing This submission may be published.

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2. Summary

We note that the intention of the Bill is to ensure that the anti-discrimination complaint process in the *Anti-Discrimination Act 1977* (NSW) ('the Act') operates fairly and efficiently and is not subject to misuse. However, the Bill is likely to have the effect of excluding many legitimate complaints. In particular, the Bill seeks to require the President to decline complaints in many circumstances, and to prevent any complaint declined by the President from being heard and determined by the New South Wales Civil and Administrative Tribunal ('NCAT').

The Act seeks to protect the fundamental human right to live without discrimination, and to provide remedies to people who experience various forms of discrimination. These protections, and these remedies, must be accessible to all members of society, and in particular to members of groups that already face various forms of disadvantage and exclusion.

The Act currently provides several mechanisms for identifying weak complaints, such as the President's power to terminate a complaint after investigation, and by requiring leave where a terminated complaint is referred to NCAT.

The Bill would fundamentally shift the balance between preventing misuse of the Act, and allowing appropriate access to hearing, determination and remedies for members of groups who experience unlawful discrimination. Indeed, the Bill may be contrary to Australia's human rights obligations, by effectively denying access to a remedy for discrimination.

We therefore do not support the passage of the Bill.

Recommendation: That the New South Wales Parliament reject the Bill.

3. Background

The Act defines certain conduct (including discrimination, sexual harassment, and vilification) as unlawful, and it sets out the process by which allegations of unlawful discrimination are resolved. The dispute-resolution process has two stages:

1. making a complaint to the Anti-Discrimination Board ('the Board') (including possible conciliation); and
2. referral of complaints to the NCAT.

This two-stage process applies to all types of complaints that can be made under the Act.[1] Therefore, any changes to the process (except where otherwise provided) would change the process for all types of complaints.

At the Board itself, the process has two stages.

First, when a complaint is received by the President, he or she must determine whether to accept or decline the complaint.[2] The President may decline a complaint in several circumstances. Most significantly, a complaint may be declined if the conduct complained of could not amount to a contravention of the Act, or if the conduct occurred more than 12 months before the complaint was made.[3] If a complaint is declined at this stage, it cannot be dealt with by the NCAT.[4]

Second, if the complaint is accepted, the President must investigate it[5] and may attempt to resolve it by conciliation.[6] At any time after accepting a complaint, the President may decline it, based on any of the grounds set out in s 92. These grounds are much more extensive than those in s 89B. They include, for example, that the President is satisfied that the complaint is 'frivolous, vexatious, misconceived and lacking in substance', or that the complaint should be dealt with by another body or person, or that further action is not warranted.[7]

Whereas a complaint that is declined at the initial stage (under s 89B) cannot be dealt with by the NCAT, a complainant can request that a complaint declined during investigation (under s 92) be referred to the NCAT for determination – this is specifically provided by s 93A.[8] Also, if a complaint cannot be resolved by conciliation, the President must refer it to NCAT.[9]

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[1] There are some exceptions. For example, s 88 applies only to vilification complaints.
[2] Section 89B.
[3] Section 89B (2).
[4] Section 89B (4).
[5] Section 90.
[6] Section 91A.
[7] Section 92 (1).
[8] The complainant has 21 days after the complaint is declined to request the President to refer it to NCAT: s 93A (1). The complainant must also obtain leave of NCAT to commence proceedings when the complaint has been declined under s 92: s 96(1).
[9] Section 93C.

It is important to note the purpose of the Act, and the nature of discrimination complaints, before considering the proposed amendments.

Firstly, the dispute-resolution process established by the Act is intended to provide a quick, inexpensive, accessible and informal means for resolving disputes concerning alleged breaches of the Act. The Act seeks to 'promote equality of opportunity between all persons.'[10] Freedom from various forms of discrimination (such as racial or gender-based discrimination) is recognised as a fundamental human right under international law.[11]

Second, many people who experience the various forms of discrimination prohibited by the Act are members of disadvantaged communities, such as racial and ethnic minorities. Members of these groups commonly experience various forms of social, political and economic disadvantage. For example, they may have difficulty accessing legal advice and assistance, due to language or financial barriers.[12]

Because of these factors, the process for resolving complaints should not be unduly onerous or difficult for complainants. Restricting access to hearing, determination and remedies for victims of discrimination would likely further disadvantage already marginalized members of the community.[13]

The Act currently has two mechanisms for identifying potentially weak complaints:

1. The President may decline a complaint, either initially, or after investigating the complaint;
2. Where a complaint has been declined by the President, leave is required for the complaint to be determined by the NCAT.

We submit that these mechanisms provide adequate protection against weak complaints proceeding to NCAT. Further, neither the Board nor the NCAT is currently experiencing a larger than usual number of complaints or referrals, and there is no evidence of a larger than usual number of complaints that are 'frivolous, vexatious, misconceived or lacking in substance'. Very few complaints are referred to the NCAT after being terminated by the President.[14]

This submission notes with concern that the Second Reading Speech ('the Speech') for the Bill included very disparaging comments regarding individuals who have made complaints under the Act.[15] Victims of discrimination should be encouraged to exercise their rights under the Act, rather than maligned for doing so. It is concerning also that the Speech described complainants as

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[10] Long title.
[11] Beth Gaze and Belinda Smith *Equality and Discrimination Law in Australia: An Introduction* (Cambridge, 2017) 30-3. In particular, Australia has ratified the *International Covenant on Civil and Political Rights*, which prohibits various forms of discrimination (arts 2 and 26), and which requires the provision of remedies for breach of these rights (art 2(3)).
[12] Ibid chapter four.
[13] Ibid chapter seven.
[14] In 2018-19, 37 complaints were referred to the NCAT after being declined under s 92: Anti-Discrimination Board of NSW *Annual Report 2018-19* 12 *Table 3: Outcome of complaints finalized 2018-19*. This represents less than 4% of the total complaints received by the Board.
[15] New South Wales, *Parliamentary Debates*, Legislative Council, 27 February 2020 (Mark Latham).

'activists', 'vexatious', and 'litigious types'. Discrimination is often underpinned by prejudice towards and negative stereotypes regarding members of certain groups, and the Speech seemed to reinforce certain stereotypes, rather than eliminating them (as the Act seeks to do).

4. The Bill is likely to prevent legitimate complaints

Our primary concern regarding the Bill is that it would have the effect of preventing legitimate complaints of unlawful discrimination from being considered and resolved by the President, and being heard and determined by NCAT.

This submission will now examine the various aspects of the Bill; however, the Bill must be considered in its entirety, to determine its full impact.

4.1 Removing the President's discretion to accept or decline complaint

Currently, the President *may* decline a complaint under ss 89B or 92. The Bill seeks to make this mandatory under both sections. The Speech states that this would bring the Act into line with 'interstate practice'. This is not correct, and the Bill goes further than any other jurisdiction in restricting access to remedies.

For example, the *Australian Human Rights Commission Act 1986* (Cth) ('AHRCA') requires the President to terminate a complaint if satisfied that the complaint is 'trivial, vexatious, misconceived and lacking in substance', or if there is no reasonable prospect of the matter being settled by conciliation.[16] The eight other grounds for termination in the AHRCA remain optional.[17] Similarly, the *Anti-Discrimination Act 1991* (Qld) requires the Commissioner to reject a complaint if the Commissioner determines that it is frivolous, trivial or vexatious, or misconceived and lacking in substance.[18] Other grounds for rejecting a complaint are optional.[19] In no Australian jurisdiction is mandatory termination of complaints required for *all* (or even most) of the grounds on which termination is provided for. Therefore, removing the President's discretion is not required for consistency with 'interstate practice'. Rather, in most jurisdictions, mandatory termination is required in only certain limited circumstances.

Requiring the President to decline a complaint is particularly problematic when it prevents the complaint from proceeding. Declining a complaint under s 89B prevents the complaint proceeding to the NCAT.[20] The Bill also seeks to prevent a complaint declined under s 92 from being referred to the NCAT following termination.[21]

One of the purposes for termination is to allow a complainant (for example, when conciliation has failed) to commence proceedings in respect of the dispute.[22] Under the AHRCA, mandatory

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[16] *Australian Human Rights Commission Act 1986* (Cth) ('*AHRCA*') s 46PH(1B).
[17] Ibid s 46PH(1).
[18] *Anti-Discrimination Act 1991* (Qld) s 139.
[19] Ibid s 140.
[20] Section 89B(4).
[21] See section 4.2 of this submission.
[22] Under *AHRCA* s 46PO, court proceedings can be commenced only after a complaint is terminated.

termination does not have the effect of preventing a complaint from proceeding further, but rather (in certain circumstances) it allows a complainant to commence proceedings.

However, requiring the President to decline certain complaints, in the context of other aspects of the Bill, is likely to restrict or prevent victims of unlawful discrimination from seeking redress under the Act.

This proposed change should be rejected.

4.2 Preventing terminated complaints from being referred to NCAT

The Bill seeks to prevent the President from referring a complaint to NCAT (under s 93C) when it has been declined under s 92. The main reason given in the Speech for this change is that it is 'inconsistent' with s 89B (a complaint declined under s 89B cannot be reviewed by NCAT).

However, ss 89B and 92 do not serve the same legislative purpose. The grounds for declining a complaint under s 89B are relatively clear 'threshold' questions – such as the relevant conduct occurring more than 12 months before the complaint was made. On the other hand, the grounds for declining a complaint under s 92 are broader and require evidence to be substantiated. For example, a complaint may be declined if the President is satisfied that the complaint is 'frivolous, vexatious, misconceived and lacking in substance'. This is an evaluation based on further details about the case.

Further, the roles of the President, on the one hand, and NCAT, on the other, are not equivalent. Whereas the President is an administrative decision-maker, the NCAT is a tribunal with greater powers and mechanisms for finding facts and testing evidence.[23]

The President's determination to decline a complaint operates as a signal to complainants and the tribunal, rather than as a gatekeeper. It is a preliminary assessment, but not a final one, warning the complainant and the tribunal that the claim is lacking or inappropriate in some way. This is reinforced at the tribunal level where the complainant bears the additional burden of needing to obtain leave of the tribunal to have their matter determined (s96). These mechanisms exist and operate together to ensure the process is not abused. However, preventing a complaint that has been declined under s 92 from being referred to NCAT potentially restricts access to justice for people alleging a contravention of the Act. Such referrals are already subject to a 21-day time limit for requesting referral, and they must also be given leave by NCAT to commence proceedings. These are adequate safeguards to prevent unmeritorious proceedings.

This proposed change should be rejected.

4.3 New grounds compelling the President to decline complaint

The Bill seeks to add seven further grounds to s 89B which, if satisfied, would compel the President to reject complaints prior to investigation. As noted above, when a complaint is declined under s 89B, the complaint cannot proceed to conciliation or to the NCAT.

[23] Section 108.

These proposed new grounds are likely to exclude legitimate complaints of unlawful discrimination. There are also specific problems with the grounds that the Bill would add, which will now be outlined.

4.3.1 'FRIVOLOUS, VEXATIOUS, MISCONCEIVED OR LACKING IN SUBSTANCE'

The Bill seeks to make it mandatory for the President to decline a complaint if satisfied that it is 'frivolous, vexatious, misconceived or lacking in substance.' We submit that it is inappropriate to require the President to decline a complaint on this basis without investigation, particularly when this decision operates to prevent a complaint from proceeding further. This requirement is likely to disadvantage people who are unable to afford or obtain legal advice or assistance prior to lodging a complaint, which may result in the complaint being inarticulately expressed.

Further, the Bill lists certain matters that the President 'is to consider' in determining whether a complaint should be declined as being frivolous, vexatious, misconceived or lacking in substance. Specifically, it lists 'the number of complaints lodged by the complainant … in respect of the same respondent, and…in respect of the same or similar conduct'.

This potentially prevents a victim of repeated contraventions of the Act by the same person from taking action under the Act to seek redress for, and to prevent, such repeated unlawful discrimination. This represents a serious restriction on the rights of victims to seek protection from such repeated conduct, and it severely undermines the object of the Act in seeking to promote equality of opportunity between all people. Rather than seeking to characterise complaints of repeated unlawful conduct by the same person as 'vexatious', the Act should provide protection from such conduct.

4.3.2 INTERSTATE VILIFICATION COMPLAINTS

The Bill seeks to make it mandatory for the President to decline a complaint that relates to interstate vilification. In broad terms, it seeks to prevent vilification complaints from being made against residents of another State or Territory, where the person was not 'in New South Wales' at the time the statement was made.

The proposed exception is vague and uncertain in its drafting. Most significantly, it fundamentally misconceives the nature of public statements that amount to vilification. The anti-vilification provisions in the Act apply only to 'public acts'.[24] Currently, they apply to *all* public acts – except those specifically excluded.[25] The proposed exception seeks to create another category of exempt conduct, which is of uncertain scope. In defamation law, public statements are actionable wherever they are read, regardless of where they are published.[26] No other anti-vilification laws in Australia prevent complainants from making a complaint regarding vilification based on where the respondent resides, or where the relevant statements were made.

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[24] See, eg, s 20B in respect of racial vilification.
[25] See, eg, s 20C(2) in respect of racial vilification.
[26] *Dow Jones and Company Inc. v Gutnick* (2002) 210 CLR 575.

The amendment would remove protection for people in New South Wales ('NSW') for discrimination and vilification by way of public statements made outside NSW by non-residents of NSW. This would prevent legitimate complaints from being investigated and possibly conciliated.[27]

This proposed change should be rejected.

4.3.3 DECLINING COMPLAINTS THAT FALL WITHIN AN EXCEPTION

The Bill seeks to make it mandatory for the President to decline a complaint that 'falls within an exception to the unlawful discrimination concerned'.

We submit that it is not appropriate to decline a complaint on this basis before further information is sought from the complainant and the respondent. Whether or not an exception applies to particular conduct often raises complex factual and legal issues, and the President is unlikely to have these details at the preliminary stage.

Also, respondents bear the onus for raising and proving that an exception applies. It is unlikely that the President would have this information at the point of determining whether to accept or decline a complaint. Therefore, this proposed amendment has potential dangers (in particular that complaints may be declined without proper consideration of whether an exception really applies).

This proposed change should be rejected.

4.3.4 DECLINING COMPLAINTS WHERE THE RESPONDENT HAS A COGNITIVE IMPAIRMENT

The Bill seeks to make it mandatory for the President to decline a complaint where the respondent has a cognitive impairment that contributes to the conduct that is the subject of the complaint. There are a number of problems with this provision.

First, the provision does not specify the degree of impairment that is required for it to apply to a respondent. Second, whether or not a person has a cognitive impairment, and whether this impairment was a 'significant contributing factor' to particular conduct raises complex factual and legal issues. As was noted above, it is unlikely that the President would have this information at the point of determining whether to accept or decline a complaint. Therefore, it is inappropriate to require the President to decline a complaint on this ground at a preliminary stage. Finally, and more importantly, declining a complaint because of an impairment of the respondent denies the respondent access to justice, contrary to Article 13 of the *Convention on the Rights of Persons with Disabilities*.

This proposed change should be rejected.

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[27] In *Burns v Corbett* [2018] HCA 15 (18 April 2018) the High Court held that NCAT could not determine a dispute between residents of different States, as this would involve a tribunal exercising judicial power. However, this decision has no relevance to resolution of discrimination complaints by the Board. Therefore, this aspect of the Bill is not required by the Court's decision.