Submission No 132

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

Organisation: NSW Council for Civil Liberties

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New South Wales
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NSWCCL SUBMISSION

NSW PARLIAMENT
LEGISLATIVE COUNCIL
PORTFOLIO COMMITTEE NO. 5 – LEGAL AFFAIRS

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Introduction

1. The New South Wales Council for Civil Liberties (*NSWCCL*) welcomes the opportunity to make submissions to the Legal Affairs Committee concerning *the Anti-Discrimination Amendment (Complaint Handling) Bill 2020.*
2. This submission argues that the Bill in question is both unnecessary and inappropriately dilutes the protection offered by the Anti-Discrimination regime established in NSW. Although the Bill purports to amend only the complaints procedure and not the substantive legal protections available to residents of NSW, it does in fact create the possibility of a marked reduction in the available legal protections.
3. While the Australian Christian Lobby welcomes the changes as an antidote to the alleged provision by the Anti-Discrimination Act of what the ACL considers "a platform for political activists" launching complaints to further their "personal vendetta[s] or political motives",[1] NSWCCL does not agree with this characterisation of the Board. We note that no evidence was provided by the ACL to establish this assertion.
4. Likewise, Mr Latham's second reading speech is light on evidence that this reform is needed.[2] He goes into some detail about one serial litigant, Mr Gaynor. Of course, the presence of a single litigious person, without aggregate data, does not demonstrate the system is not functioning appropriately, nor does the fact that some of his complaints were not dismissed.
5. Mr Latham then seemingly argues that the fact that President Annabelle Bennett SC had not rejected the complaint against Israel Folau - concerning his comments on social media regarding homosexuality (as of February 2020) - prior to the investigation stage *ipso facto* suggests the complaints handling process is broken. Mr Latham points to two exemptions which *in his view* apply to Folau's case, namely s49ZT(2)(c) and s56 of the Act, which respectively exempt reasonable, good faith public acts done for purposes in the public interest, and acts or practices of bodies established to propagate religions.

[1] https://www.acl.org.au/mr_nsw_antidiscrim#splash-signup.

[2] *Anti-Discrimination Amendment (Complaint Handling) Bill 2020,* Second Reading Speech (27 February 2020), accessed at <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-81481'>

6. However, as Ms Bennet pointed out, s92 of the Act provides a range of grounds for the President to dismiss complaints, including on the basis that they are frivolous or vexatious, or exempt under s49ZT or s56, at the President's discretion.[3] Ms Bennet also reasonably responded that she was waiting for more information to come before her in respect of the matter before exercising her s92 powers, about which she was well aware.[4] The mere fact that the President has not exercised her discretion at the time demanded by Mr Latham does not indicate that the system does not adequately provide for defence against vexatious litigants or is allowing complaints which fall within an exception to proceed inappropriately. It may be entirely appropriate to provide opportunities for hearing and gather more evidence before dismissing a claim because the act complained of by the aggrieved is exempt.

7. Mr Latham's critique amounts to no more than a disagreement with the manner in which the President's discretion has been exercised.

8. On a preliminary assessment of the data published in the ADB's annual report, the system of complaint handling does not seem to be overly accommodative to complainants, nor does it seem to present major congestion issues for the NSW administrative or justice system. Only 1,027 complaints were made in 2018-19.[5] 93.2% of complaints were finalised within 12 months.[6] Only 18.5% of complaints went on to the Tribunal, less than the amount of claims settled before or after conciliation and far less than the amount declined by the President at various stages or withdrawn or abandoned.[7]

9. Nevertheless, it must be emphasised that the onus lies on proponents of this Bill to make the case for reform. CCL does not suggest that the Anti-Discrimination regime as it currently exists is perfect; but it believes proponents of the Bill have not adequately proved the necessity for reform.

Specific Issues

Section 93A

10. The Bill would remove s93A of the Act. This provision currently allows a person who has received notice that their complaint was declined under s87B(4) or s92 to require that the President refer the matter to the NSWCAT.

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[3] Ibid.
[4] Ibid.
[5] Annual Report of the ADB 2018-19, accessed at < https://www.antidiscrimination.justice.nsw.gov.au/Documents/Anti-Discimination-Board-of-NSW-Annual-Report-2018-19.pdf>
[6] Ibid.
[7] Ibid.

11. Mr Latham argues that deleting s93A is more consistent with s89B(4), which provides that the NSWCAT cannot review a decision by the President to decline a complaint before the investigation stage.[8] However, even if his contention could be accepted with respect to s87B(4) rejections – a species of rejection occurring in circumstances where a complaint is made on behalf of another person and, like 89B(4), which occurs prior to the investigation stage - it cannot be accepted with respect to s92 rejections.

12. This is because s92 rejections occur during a later stage; the investigation stage. Declining a complaint under s92 involves a different set of considerations from declining under s89B. As Legislation Review Digest No 11 notes, there may be good reason to provide a right of review with respect to s92 decisions but not to s89B decisions, given the far broader and discretionary grounds provided to the President by s92 for declining a complaint compared to those given at the initial stage under s89B.[9] Furthermore, declining a complaint under s92 indicates that the President has not identified cause to exercise their s89B powers, and by implication considered that the complaint deserves to move to the investigation phase.

13. Moreover, as a matter of general principle, NSWCCL considers it preferable, where possible, to provide an opportunity for review of executive decision-making. Though this always carries the potential to induce litigation, it is an essential bulwark against the misuse of power by the State. This is especially so in an area of great personal and social significance such as decision-making pursuant to discrimination complaints. Mr Latham does not worry about the potential for incorrect or unpreferable decision-making to go uncorrected and therefore for discrimination to go unaddressed; he only worries about the matter clogging up the NSW justice system.[10]

Proposed Section 89B

14. The proposed insertions to s89B broaden the range of categories available to the President to decline a complaint, but also transform them from simply relevant grounds on which the President can decline to grounds which, if satisfied, require the President to decline.

15. NSWCL considers the curtailing of the President's discretion to be inappropriate. It is inconsistent with the discretion conferred on, for example, the President of the Human

[8] Ibid.
[9] Legislation Review Committee, LEGISLATION REVIEW DIGEST NO. 11/57 – 24 March 2020, accessed at <https://www.parliament.nsw.gov.au/ladocs/digests/643/Digest%20No.%2011%20-%2024%20March%202020.pdf>, 5.
[10] *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Second Reading Speech (27 February 2020), accessed at <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-81481'>

Rights Commission under the *Australian Human Rights Commission Act 1986 (Cth),*[11] and that of the Victorian Equal Rights and Opportunity Commission under the *Equal Opportunity Act 2010 (Vic).*[12] As Mr Latham says, other States and Territories require the relevant official to reject complaints in certain circumstances.[13] Evidently there is no 'overwhelming consensus' model, in the absence of which there is no compelling reason to adopt Mr Latham's preferred model except on the merits.

16. Imparting discretion on the President in deciding whether a complaint should be rejected, and on what bases, prior to the investigation phase is, in NSWCCL's view, a sensible arrangement which preserves the ability of the President to consider the circumstances of each complaint and dispense individualised justice on that basis. In some circumstances, that may involve letting the complaint proceed to the investigation stage despite perhaps engaging some of the grounds for declining in s89B.

17. Some of the additional grounds in the proposed s89B are also troubling. For example, the President would be required 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 may be sensible, but introduces the possibility, albeit probably rare, that respondents argue in bad faith or dishonestly that they are subject to cognitive impairments in the relevant sense to escape liability for discriminatory remarks. Furthermore, an assessment that a cognitive impairment was or was not a significant contributing factor to the conduct is not a decision that the President of the Board is likely well equipped to make. Note that there is no review available under s89B.

18. By requiring that complaints involving a respondent who made a public statement in, or was a resident of, another State or Territory should be dismissed, the Bill reduces the protection provided by the Act significantly. Though this is purportedly designed to avoid forum shopping, it is common sense that a complainant who was potentially discriminated against should be able to avail himself of a remedy in his own state, rather than having to utilise the institutions of other jurisdictions. This is consistent with the purpose of facilitating a complaints process under NSW Anti-Discrimination law, which is to provide a means of vindicating the rights and dignity of the aggrieved party. As such, it is to the rights and needs of the aggrieved that the Act should be sensitive. This is not analogous to a system of

[11] *Australian Human Rights Commission Act 1986 (Cth)*, s46PH.
[12] S116, 139 *Equal Opportunity Act 2010 (Vic).*
[13] *Anti-Discrimination Amendment (Complaint Handling) Bill 2020,* Second Reading Speech (27 February 2020), accessed at <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-81481'>. Also see the *Anti-Discrimination Act 1991 (Qld*), s139.

punishment by the State such as the criminal law, where the jurisdiction in which the crime was committed holds such importance.

Section 92

19. The President's discretion would again be removed with respect to the declining of complaints at the investigation stage under the amended s92. For the reasons mentioned above in relation to s89B, NSWCCL considers this unwise and unnecessary.

Recommendations

20. **NSWCCL views the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 as an unnecessary intervention with the potential to materially reduce the effectiveness of the Anti-Discrimination system in NSW. The Bill should not be enacted.**

This submission was prepared by Jared Wilk on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Committee.

Yours sincerely,

Michelle Falstein
Secretary
NSW Council for Civil Liberties

Contacts in relation to this submission: Co-Convenors of the NSWCCL Civil Liberties and Human Rights Action Group, Jared Wilk, or Dr Lesley Lynch