

Supplementary
Submission
No 22a

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

Organisation: Institute for Civil Society

Date Received: 8 May 2020



Supplementary submission regarding the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

8 May 2020

Committee Secretary
Portfolio Committee No. 5 – Legal Affairs
Legislative Council
Parliament House, Macquarie St
Sydney NSW 2000

The Institute for Civil Society (ICS) is a social policy think tank which seeks to:

1. Promote recognition and respect for the institutions of civil society which sit between the individual and the State such as clubs and associations, schools, religious bodies, charities and NGOs.
2. Promote recognition and protection of traditional rights and freedoms such as freedom of association, freedom of expression and freedom of conscience and religion.
3. Promote a sensible and civil discussion about how to balance competing rights and freedoms.

ICS made a submission to the Committee supporting the general thrust of the “Anti-Discrimination Amendment (Complaint Handling) Bill 2020” (the Bill) on 20 April 2020. ICS considered the Bill was sound in its intentions of remedying the clear problem that the NSW Anti-Discrimination Board had accepted and continued to investigate and conciliate vilification and anti-discrimination complaints which it should have declined to accept or should have rejected at an early stage of investigation.

ICS offered to provide a more detailed submission if the Committee desired. With the Committee’s permission, ICS now provides this supplementary submission with proposed redrafting to better achieve the goal of the Bill to address the misuse of the complaints mechanism under the *Anti-Discrimination Act 1977* (the Act).

The proposed redrafting is based on the bipartisan recommendations of the Commonwealth Parliamentary Joint Committee on Human Rights Inquiry report titled '*Freedom of speech in Australia: 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)*' dated 28 February 2017, referred to as the 'PJCHR Inquiry'. The recommendations were set out in our first submission.

That inquiry was convened in response to what was considered to be the misuse of the complaints processes under the Australian Human Rights Commission under the *Australian Human Rights Commission Act 1986 (Cth)* (ARCHA). Many of the bipartisan recommendations of the Inquiry resulted in bipartisan amendments to the procedures for the making of complaints to the AHRC. Given the similarity in the factors prompting consideration of reform, and the bipartisan political consensus reached, the recommendations of the PJCHR Inquiry are considered to be of particular relevance to this inquiry, providing a way forward for substantial reform.

Below we provide a **marked-up** version of Part 9 of the Act which shows how that Part would be amended by:

- (a) the Bill (the Bill's amendments to Part 9 are in tracked changes and normal font);
- and**
- (b) our proposed amendments to the Part including to the Bill's changes based on our review of the PJCHR Report and the amendments to the ARCHA (our amendments are in tracked changes and also in italic font) (including by italicising text that has been deleted).

In a limited number of places we have reinstated a provision of Part 9 that is deleted by the Bill. Where this has occurred, this is clarified by a comment placed in the margin of the document.

We have included some comments explaining our proposed changes.

We believe our proposed amendments provide a fairer system of handling vilification and discrimination complaints. We can provide further detail to the Committee if it wishes.

PROPOSED REDRAFT OF PART 9 OF THE *ANTI-DISCRIMINATION ACT 1977*

Division 1—Preliminary

87 Definitions

In this Part:

"agent" includes Australian legal practitioner.

"complainant" means a person by whom or on whose behalf a complaint is made.

"complaint" means a complaint made under section 87A and includes a matter referred to the Tribunal as a complaint under section 95 (2).

"representative body" means a body (whether incorporated or unincorporated) that represents or purports to represent a group of people within New South Wales (whether or not the body is authorised to do so by the group concerned) and that has as its primary object the promotion of the interests or welfare of the group.

"representative complaint" means a complaint made by one or more persons (which may comprise or include a representative body) on his, her or their own behalf as well as on behalf of another person or persons, and that is treated by the Tribunal as a representative complaint.

"respondent" means a person about whose conduct a complaint has been made.

"vilification complaint" means a complaint in respect of a contravention of section 20C, 38S, 49ZT or 49ZXB.

Division 2—Complaints—the functions of the President

Subdivision 1—Lodgment of complaints

87A Persons who may make a complaint

(1) A complaint alleging that a named person has, or named persons have, contravened a provision of this Act or the regulations (other than a provision for which a specific penalty is imposed) may be made by any of the following:

(a) one or more persons:

(i) on his, her or their own behalf, or

(ii) on his, her or their own behalf as well as on behalf of another person or persons,

(b) a parent or guardian of a person who lacks the legal capacity to lodge a complaint (for example, because of age or disability),

(c) a representative body on behalf of a named person or persons, subject to section 87C,

(d) an agent of any of the persons referred to in paragraph (a), (b) or (c).

(2) Nothing in this Division prevents a person from making a complaint (not being a representative complaint) even though the conduct in respect of which the complaint is made is also conduct in respect of which a representative complaint has been made.

(3) In this section, "**guardian**" has the same meaning as it has in the *Guardianship Act 1987*.

87B Complaints made on behalf of others

(1) When a complaint is made on behalf of another person or persons ("**the other complainants**"):

(a) the person who makes the complaint is, for the purposes of this Division, taken to have the same rights, obligations and interests with respect to the investigation, conciliation or referral of the complaint as the other complainants, and

(b) the complaint is, for the purposes of this Part, taken to have been made by the other complainants on their own behalf.

(2) In respect of a complaint made wholly or partly on behalf of another person or persons (not including a complaint made on behalf of a person who lacks legal capacity), the President may require:

(a) the person or persons on whose behalf the complaint is made to show that the complaint has been made with his, her or their consent, or

(b) the person or persons making the complaint to prove that he, she or they have authority to act at all times in the complaint handling process,

or both.

(3) In respect of a complaint made wholly or partly on behalf of another person or persons (including a complaint made on behalf of a person who lacks legal capacity), if at any time the President is not satisfied that the person who made the complaint is acting in the best interests of the person or persons on whose behalf the complaint was made or retains the confidence of that person or those persons, the President may (without limiting section 92):

(a) appoint another person to act in that behalf, or

(b) decline the complaint.

The regulations may make provision for or with respect to matters that may be taken into consideration by the President in making a decision under this subsection.

(4) On declining a complaint under subsection (3) (b), the President is to advise the complainant, by notice in writing, of:

~~(a) the declining of the complaint, and~~

~~(b) the rights of the complainant under section 93A.~~

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(5) This section does not apply to a complaint made by:

- (a) an agent, or
- (b) a representative body.

87C Complaints by representative bodies

(1) Before a complaint can be made by a representative body as referred to in section 87A (1) (c), the representative body must satisfy the President:

(a) that each person on whose behalf the complaint is made consents to the complaint being made by the body on his or her behalf, and

(b) that the body has a sufficient interest in the complaint, that is, that the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects, or has the potential to adversely affect:

- (i) the interests of the body, or
- (ii) the interests or welfare of the group of people it represents or purports to represent.

(2) The President may require a representative body that has made a complaint to nominate a person to appear for the representative body in conciliation proceedings concerning the complaint before the President.

88 Vilification complaints

(1) A vilification complaint cannot be made unless each person on whose behalf the complaint is made has suffered a detriment as a result of the asserted vilification and:

(a) has the characteristic that was the ground for the conduct that constitutes the alleged contravention, or

(b) claims to have that characteristic and there is no sufficient reason to doubt that claim.

~~(2) A vilification complaint cannot be made unless the public act that is the subject of the complaint occurred in New South Wales.~~

88A Assistance by President *in making complaints*

The President may assist a person to make ~~or to respond to~~ a complaint. *Assistance provided to respondents is to be consistent with assistance offered to complainants.*

88B *Making of e*Complaints *may not be made* in more than one jurisdiction

(1) A person ~~may not make is not prevented from making~~ a complaint under this Division ~~if only because~~ the person has made a complaint or taken proceedings in relation to the same facts in another jurisdiction, whether in New South Wales or elsewhere

~~(2) The Tribunal must have regard to any such proceedings, and to the outcome of any such proceedings, in dealing with or determining the complaint.~~

88C Withdrawal of consent for complaint

(1) If a complaint has been made on a person’s behalf with the person’s consent, the person may withdraw the consent:

- (a) by notice in writing to the President, at any time before the complaint is declined, terminated or otherwise resolved by the President, or referred to the Tribunal, or
- (b) by notice in writing to the Tribunal, at any time before the complaint is dismissed, or found to be substantiated, by the Tribunal.

(2) If a consent is withdrawn, the President or the Tribunal may make such arrangements as the President or the Tribunal, as the case requires, thinks appropriate for the further management of the complaint.

Subdivision 2–Making of complaints

89 Form and content of complaints

(1) A complaint is to be in writing but does not have to take any particular form.

Commented [AU1]: Although proposed 89B(2)(j) requires regard to the residency of the respondents, a clearer way to avoid forum shopping is to also require that any ‘public acts’ the subject of a vilification complaint actually occur in NSW. An alternative to this provision is to amend each of the respective definitions of “public act” to insert these words. That would be preferred to avoid an unnecessary distinction between the definitions and the complaints that can be made in respect of them. However this provision is included in this edited Part to illustrate the issue.

Commented [AU2]: These amendments to this provision are consistent with recommendation 7 of the PJCHR, which was: ‘empower the Australian Human Rights Commission to offer reasonable assistance to respondents consistent with assistance offered to complainants.’

Commented [AU3]: This provision was deleted by the proposed Bill. However, the mere deletion of this provision does not amount to a statement that complaints cannot be made in NSW if they have already been litigated in another jurisdiction. All Commonwealth discrimination Acts and most State and Territory Acts prevent forum shopping.

(2) A complaint, as made, need not demonstrate a prima facie case.

(2) The complaint must allege an act, omission or practice which, if true, could constitute unlawful discrimination or vilification.

(3) The complaint must set out, as fully as practicable, the details of the alleged acts, omissions or practices and the details set out must

(4) It must be reasonably arguable that the alleged acts, omissions or practices as set out in the details in the complaint, if true, would constitute unlawful discrimination or vilification.

Commented [AU4]: This was recommendation 9 of the PJCHR

89A Making of complaint

(1) A complaint is made by lodging it with the President accompanied by the fee to be paid in respect of the lodging of the complaint pursuant to section 127(4)(b).

(2) A complaint may be lodged with the President:

- (a) by delivery by post or hand to an office of the Board, or
- (b) by facsimile to an office of the Board, or
- (c) by such other means as may be prescribed by the regulations.

Commented [AU5]: This gives effect to Recommendation 9 of the PJCHR, which was as follows:

“a refundable complaint lodgement fee be lodged with the Australian Human Rights Commission prior to consideration of a complaint (with consideration given to waiver arrangements similar to those that are in place for courts)”

A fee should be required to discourage multiple or vexatious litigants

89B Acceptance or declining of complaints by the President

(1) The President is to determine whether or not a complaint made to the President is to be accepted or declined, in whole or in part.

(2) The President ~~must~~ may decline a complaint if:

- (a) no part of the conduct complained of could amount to a contravention of a provision of this Act or the regulations, or
- (b) the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint, or
- (c) the conduct complained of could amount to a contravention of a provision of this Act for which a specific penalty is imposed, or
- (d) in the case of a vilification complaint, it fails to satisfy the requirements of section 88, or

Commented [AU6]: Recommendation 16 of the PJCHR could be also incorporated into the complaint investigation regime:

3 146 The committee recommends that the Australian Human Rights Commission Act 1986 be amended to provide for a process whereby a respondent to a complaint can apply to the President for that complaint to be terminated under section 46PH of the Australian Human Rights Commission Act 1986

This would be preferable

(e) the President is not satisfied that the complaint was made by or on behalf of the complainant named in the complaint, or-

(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 President is of the opinion that 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) the complaint relates ~~to~~ to a public statement by a respondent who is an individual and, at the time of making the statement, the respondent was—

- (i) a resident of another State or Territory as evidenced by the individual’s address on the electoral roll or other evidence, and
- (ii) not in New South Wales, or

(k) the complaint falls within an exemption or an exception to the unlawful discrimination or unlawful vilification 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, or

(m) the nature of the conduct alleged is such that further action by the President in relation to the complaint, or any part of the complaint, is not warranted, or

(n) the respondent has taken appropriate steps to remedy or redress the conduct, or part of the conduct, complained of, or

(o) it is not in the public interest to take any further action in respect of the complaint or any part of the complaint.

(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.

(3) The President is to give notice of a decision to accept or decline a complaint to:

- (a) the person who made the complaint, and
- (b) if the respondent has been given notice of the complaint, the respondent,

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Commented [AU7]: The Act creates two classes of permitted conduct, exceptions and exemptions

Commented [AU8]: This is necessary to clarify that the exceptions for vilification must also be considered

Commented [AU9]: This allows the President to use the same grounds to dismiss a complaint that the President may currently use during an investigation under s92. This allows the President to rely on these grounds where it is apparent that they are satisfied in the case of a complaint, rather than requiring the President to wait for the initiating of an investigation before dismissing the complaint on these grounds

so far as is reasonably practicable, within 28 days after the decision is made.

(4) A decision under this section to decline a complaint in whole or in part is not reviewable by the Tribunal.

(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.

(6) In this section—

cognitive impairment includes an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia or a brain injury.

public statement means any form of communication published in a newspaper or periodical, on a website or social media platform, or by radio or television broadcast or in a film.

(7) For the purposes of subparagraph (1), the President may inform himself or herself of such facts and circumstances as are necessary to form the opinion referred to in paragraph (2).

Commented [AU10]: This subsection is taken from the amendments made to the ARCHA (see s 46PF(1A)) on the recommendations of the PJCHR Inquiry, and permits the President the power to inquire into whether a determination to not conduct an investigation should be made

89C (Repealed)

Subdivision 3—Investigation and conciliation of complaints

90 President to investigate complaints

(1) The President is to investigate each complaint that the President has accepted under section 89B.

(2) The President may conduct a joint investigation into more than one complaint.

(2A) If two or more complaints arise out of the same or substantially the same circumstances or subject-matter, the President must conduct a joint investigation into those complaints and must treat the complaints as a single complaint.

(3) The President must give notice to the parties if a joint investigation is undertaken.

90A Investigation of vilification complaints

(1) If a complaint to be investigated is a vilification complaint, the President may, by notice in writing, require any person to produce a copy or transcript of any broadcast the subject of the complaint at a specified place.

(2) A person must not fail to comply with the terms of a notice under this section. [Note: Maximum penalty: 50 penalty units, in the case of a body corporate, or 10 penalty units in any other case.]

90B Supplying information and documents

(1) The President may, by notice in writing, require a complainant or a person against whom a complaint is made to provide:

- (a) information (orally or in writing), or
- (b) documents,

(such information or documents, or both, being referred to in this section as "**the relevant material**") within 28 days after the date of the notice or such other period as the President determines and specifies when making the requirement.

(2) A person of whom a requirement is made under subsection (1):

- (a) must provide to the President any of the relevant material that is in the person's possession, custody or control within the period specified in the notice, unless the person has a reasonable excuse for not doing so, and
- (b) must, if the person has a reasonable excuse for not providing the relevant material, or any part of it, give notice to the President of the excuse and of the relevant material to which the excuse relates within the period specified in the notice under subsection (1).

[Note: Maximum penalty: 50 penalty units, in the case of a body corporate, or 10 penalty units in any other case.]

(3) The President may, by notice in writing, require a person other than a person referred to in subsection (1) to supply the relevant material within 28 days after the date of the notice or such other period as the President determines and specifies in the notice.

(4) A person who receives a notice under subsection (3):

(a) must provide to the President any of the relevant material specified in the notice that is in the person's possession, custody or control within the period specified in the notice, unless the person has a reasonable excuse for not doing so, and

(b) must, if the person has a reasonable excuse for not providing the relevant material, or any part of it, give notice to the President of the excuse and of the relevant material to which the excuse relates within the period specified in the notice under subsection (3).

[Note: Maximum penalty: 50 penalty units, in the case of a body corporate, or 10 penalty units in any other case.]

(5) If the relevant material is not provided or supplied under subsection (2) or (4), the President may refer the complaint to the Tribunal.

90C Progress reports

The President must, as frequently as is reasonably convenient and, in any event, at periods not exceeding 90 days from the date of lodging of the complaint under section 89A, give notice to the parties to the complaint of the steps taken for the purpose of the investigation.

Commented [AU11]: This will ensure that respondents are notified of any complaint, even prior to determination of acceptance, if the period of 90 days has lapsed

90D Notification to Respondent

- (1) If the President has decided to accept a complaint under section 89B, the President:
- (a) must notify the complaint to the respondent, and
 - (b) if the complaint is amended by adding a respondent—must notify the complaint to that respondent; and
 - (c) if any person (other than the respondent) is the subject of an adverse allegation arising from the complaint—must notify the person of the adverse allegation, unless the President is satisfied that it is not practicable to do so; and
 - (d) may notify the complaint to any person who, in the opinion of the President, is likely to be able to provide information relevant to the complaint.

(2) For the purposes of paragraphs (1)(a), (b) and (c), the President must notify the respondent or the other person, as the case may be:

(a) under paragraph (1)(a)—as soon as the President has decided to inquire into the complaint; or

(b) under paragraph (1)(b)—as soon as the complaint has been amended; or

(c) under paragraph (1)(c)—as soon as the President forms the opinion that the person is the subject of an adverse allegation arising from the complaint.

(3) For the purposes of subsections (1) and (2), adverse allegation means an allegation:

(a) that:

(i) one or more acts have been done; or

(ii) one or more omissions or practices have occurred; and

(b) that those acts, omissions or practices are unlawful discrimination or unlawful vilification.

90E President to act expeditiously and fairly

(1) At all times after the lodging of a complaint under section 89A, the President:

(a) must, having regard to:

(i) the nature of the complaint; and

(ii) the needs of the complainant or complainants; and

(iii) the needs of the respondent;

act expeditiously in dealing with the complaint in accordance with this section; and

(b) must use the President's best endeavours to finish dealing with the complaint within 12 months after the complaint was received under section 89A.

(2) The President must act fairly to:

(a) the complainant or complainants; and

(b) the respondent;

in dealing with the complaint in accordance with Part 9.

Commented [AU12]: Recommendation 6 of the PJCHR was implemented by the addition of this section to the ARCH Act. The recommendation was:
(a) dispute resolution should be provided as early as possible; and
(b) the type of dispute resolution offered should be appropriate to the nature of the dispute; and
(c) the dispute resolution process is fair to all parties

91

91A Resolution of complaint by conciliation

(1) If the President is of the opinion that a complaint, other than a complaint that the President has declined under section 92, may be resolved by conciliation, the President may, at his or her discretion, at any stage after acceptance of the complaint endeavour to resolve the complaint by conciliation.

(2) The President may, by notice in writing, require the complainant and the respondent, or either of them, to appear before the President, either separately or together, for the purpose of endeavouring to resolve the complaint by conciliation.

(3) A person must not fail to comply with the terms of a notice under subsection (2). [Note: Maximum penalty: 50 penalty units, in the case of a body corporate, or 10 penalty units in any other case.]

(4) Evidence of anything said or done in the course of conciliation proceedings under this section is not admissible in any subsequent proceedings relating to the complaint. *This subsection does not apply for the purposes of the application of section 98A.*

(5) A written record is to be prepared by the parties, and signed by or on behalf of each of them, of any agreement reached, following conciliation, with respect to the subject-matter of the complaint if any party requests the making of such a record within 28 days after the agreement is reached.

(6) If a party to a recorded agreement is of the opinion that any other party has not complied with the terms of the agreement, the party may, not later than 6 months after the date of the agreement, apply to the Tribunal to have the agreement registered.

(7) The party making the application must serve a copy of the application and the agreement on each other party.

(8) If the member of the Tribunal who hears the application is satisfied that a party to the agreement has not complied with the terms of the agreement, the member is to register those provisions of the agreement (if any) that, in the exercise of the Tribunal's jurisdiction, could have been the subject of an order in proceedings relating to a complaint.

(9) The provisions of an agreement that are registered in accordance with this section are taken to be an order of the Tribunal and may be enforced accordingly.

91B No right to representation

A complainant or respondent in conciliation proceedings before the President cannot be represented by any other person, except by leave of the President.

91C Amendment of complaint

(1) If, at any time after a complaint is made and before the complaint is declined, terminated or otherwise resolved by the President, or referred to the Tribunal:

- (a) the person making the complaint seeks to amend the complaint, or

(b) the President becomes aware of information that could conveniently be dealt with as part of the complaint,

the person making the complaint is to be offered the opportunity to amend the complaint.

(2) An amendment may be made in writing but, if further written material is already in the possession of the President or the Board, the President may treat the written material as if it formed part of the complaint.

(3) If a complaint is amended at any time, the respondent must be informed in writing by the President of the substance of the amendment and, if the effect of the amendment is to cause the complaint to be made against further or other persons, they must be informed in writing of the complaint as amended.

(4) Section 89B applies to the amendment of a complaint in the same way as it applies to the making of a complaint.

Subdivision 4—Declining of complaints during investigation

92 President ~~may~~must decline complaint during investigation

(1) If at any stage of the President's investigation of a complaint:

(a) the President is satisfied that:

(i) the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or

(ii) 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

(iii) the nature of the conduct alleged is such that further action by the President in relation to the complaint, or any part of the complaint, is not warranted, or

(iv) another more appropriate remedy has been, is being, or should be, pursued in relation to the complaint or part of the complaint, or

(v) the subject-matter of the complaint has been, is being, or should be, dealt with by another person or body, or

(vi) the respondent has taken appropriate steps to remedy or redress the conduct, or part of the conduct, complained of, or

(vii) it is not in the public interest to take any further action in respect of the complaint or any part of the complaint, or

(viii) any of the circumstances set out in sub-section 89B(2) apply, or

(b) for any other reason no further action should be taken in respect of the complaint, or part of the complaint,

the President ~~must~~may, by notice in writing addressed to the ~~complainant~~parties, decline the complaint or part of the complaint.

(2) The President, in a notice under this section, is to advise the complainant of:

(a) the reason for declining the complaint or part of the complaint, and

(b) the rights of the complainant under ~~sections 93A and~~section 96.

(3) 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

(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.

Commented [AU13]: This aligns this provision with proposed subsection 89B(5)

(4) A decision under this section to decline a complaint in whole or in part is not reviewable by the Tribunal.

Commented [AU14]: This provision follows s 89B(4) It is necessary to remove doubt. Given that s 89B(4) expressly removes any right of appeal, that should be followed to give effect to the removal of rights to appeal after investigations (if that is to be effected)

Subdivision 5—Termination of complaints

92A Settlement or resolution of complaint

(1) If at any stage of the President's investigation of a complaint the President is satisfied that the complaint, or part of the complaint, has been settled or resolved by agreement between the parties, the President may terminate the complaint, or part of the complaint.

~~(2) If the President terminates a complaint, or part of a complaint, under this section, the complainant has no right under section 93A to require the President to refer the complaint, or part of the complaint, to the Tribunal.~~

92B Withdrawal of complaint

(1) A person who has made a complaint, other than a representative complaint, may at any time, by notice in writing lodged with the President, withdraw the complaint.

(2) If the President receives a notice under subsection (1) signed by or on behalf of the complainant or, if more than one, all the complainants, the President is to terminate the complaint.

(3) If the President receives a notice under subsection (1) signed by or on behalf of some, but not all, of the complainants, the President is to treat the notice as an amendment removing the names of those persons as complainants from the complaint.

(4) The President is to give notice in writing of any decision by the President under this section to the complainant and respondent and to each person on whose behalf the complaint was made.

(5) The President is not required to give a respondent notice of the President's decision to terminate a complaint if the President had not given notice to the respondent that the complaint had been made.

92C Abandonment of complaint

(1) If a complainant has:

(a) failed to respond to a request for documents or information, or

(b) failed to give notice to the President of an address (or new address) at which he or she may be contacted,

the President may serve a notice on the complainant at his or her address last known to the President stating that, if a response is not received within 28 days, the complaint will be taken to be abandoned and the President will terminate the complaint.

(2) If a complaint is taken to have been abandoned under this section, it may be revived if, within 12 months after the end of the 28-day period referred to in subsection (1), the complainant satisfies the President that:

- (a) he or she wishes to pursue the complaint, and
- (b) the failure relied on for the purpose of subsection (1) did not take place or ought reasonably to be excused, and
- (c) no undue prejudice would be caused to the respondent by reviving the complaint.

93 Death of complainant or respondent does not terminate complaint

(1) If a complainant dies before his or her complaint is finally determined, the complaint survives and the legal personal representative of the complainant:

- (a) may continue the carriage of the complaint, including any referral, review or appeal, and
- (b) the estate of the complainant is entitled to the benefit of any monetary sum ordered to be paid by the respondent in respect of the complaint.

(2) If a respondent dies before any complaint against him or her is finally determined, the complainant may continue to pursue the complaint (including any referral, review or appeal) and any monetary sum ordered to be paid in respect of the complaint is payable from the estate of the respondent.

Subdivision 6—Referral of complaints to Tribunal

~~93A Referral of complaints to Tribunal at requirement of complainant~~

~~(1) If the President has given a complainant a notice under section 87B (4) or 92, the complainant may, within 21 days after the date on which the notice was given, require the President, by notice in writing, to refer the complaint to the Tribunal.~~

~~(2) On receipt of a notice under subsection (1) from the complainant, the President is to refer the complaint to the Tribunal.~~

Commented [AU15]: An alternative approach is that a decision to decline complaint after investigation under 92 should be reviewable, but a decision to not accept a complaint under 89 should not be. Instead, for appeals from a post-investigation decline, as a deterrent against vexatious complaints, costs should be available to a respondent who successfully defends the complaint where an investigation has been declined. That would require amendment of the NCAT legislation if it were to be given effect. Such a regime could also require the NCAT to give its consent to hearing of any appeal (as opposed to an automatic right of appeal)

Such an amendment would be supported by a further amendment requiring such a complainant to offer security for costs. This proposal is supported by the PJCHR Recommendation 21:

3.157 The committee recommends that a plaintiff/complainant, following the termination of a complaint by the Australian Human Rights Commission, who makes an application to the Federal Court or Federal Circuit Court under section 46PO of the Australian Human Rights Commission Act 1986, in relation to a complaint that in whole or in part involves Part IIA of the Racial Discrimination Act 1975, be required to provide security for costs subject to the court's discretion

If such an avenue is pursued, notice to the complainant of the declined complaint should state the Tribunal or Court can award costs in proceedings under the relevant section. This is provided under s 46PH(2A) of the ARCHA

93B Referral of unresolved complaints to Tribunal after 18 months

- (1) If a complaint has not been declined, terminated or otherwise resolved within 18 months after the date on which it was made, a party to the complaint may request the President by notice in writing to refer the complaint to the Tribunal.
- (2) On receipt of the notice, the President must give notice in writing to all the other parties to the complaint of the request.
- (3) If, within 28 days after the President gives notice to all the other parties, no party has objected to referral of the complaint, the President is to refer the complaint to the Tribunal.
- (4) If the complainant objects to the referral of the complaint, the President must not refer the complaint to the Tribunal, but may, if satisfied that there is no reasonable prospect of a conciliated agreement, terminate the complaint.
- (5) If the respondent objects to the referral of the complaint, the President is to refer the complaint to the Tribunal, unless satisfied that there are reasonable prospects of a conciliated agreement.

93C Other referral of complaints to Tribunal

If the President:

- (a) is of the opinion that a complaint cannot be resolved by conciliation, or
- (b) has endeavoured to resolve a complaint by conciliation but has not been successful in his or her endeavours, or
- (c) is of the opinion that the nature of a complaint is such that it should be referred to the Tribunal, or

(d) is satisfied that all parties wish the complaint to be referred to the Tribunal and that it is appropriate in the circumstances to do so,

the President is to refer the complaint to the Tribunal.

[Note: The President may also refer a complaint to the Tribunal under section 90B (5).]

94 Severing complaints

If there is more than one complainant or respondent to a complaint, the President may, in dealing with the complaint under section 93B or 93C, if the President thinks fit, treat the complaint as a number of complaints by or against each such complainant or respondent.

94A Form of complaint to be referred to Tribunal

(1) If a complaint is referred to the Tribunal under this Division, the complaint is to comprise:

(a) the original complaint lodged with the President, and

(b) any amendment made pursuant to section 91C, and

(c) any other documents or information obtained or recorded by the President that, in the opinion of the President, help to identify the subject-matter of the complaint or otherwise contain an allegation of a contravention of a provision of this Act or the regulations.

(2) A complaint that is referred to the Tribunal is to be accompanied by a report relating to any investigation by the President of the complaint.

Subdivision 7—Miscellaneous

94B Calculation of time

If a notice under this Division is given by post, a period calculated from the day on which the notice is given is taken to run from, and includes, the fourth day after the notice was posted.

94C Delegation—officers of President

(1) The President:

(a) may designate a specified person or the holder of a specified office for the purposes of this section, and

(b) may delegate to such a person or office holder the exercise of such of the President's functions (other than this power of delegation) as may be specified in the delegation.

(2) A person who is a delegate of the President under this section is a member of staff of the President.

(3) Nothing in this section limits the application of section 49 of the *Interpretation Act 1987*.

Division 3—Complaints—the functions of the Tribunal

95 Referral of complaints to Tribunal

(1) A complaint may be referred to the Tribunal by the President under section 90B, ~~93A~~, 93B or 93C, *but must not otherwise be referred to the Tribunal*.

Commented [AU16]: This is to remove doubt that an appeal cannot be made from a decision under s 92

(2) The Minister may refer any matter to the Tribunal as a complaint.

(3) (Repealed)

95A (Repealed)

96 Leave of Tribunal required for inquiry into certain matters

~~(1) A complaint that is referred to the Tribunal on the requirement of a complainant under section 93A (1) may not be the subject of proceedings before the Tribunal without the leave of the Tribunal.~~

(2) An issue that is the subject of proceedings before the Industrial Relations Commission may not be the subject of proceedings relating to a complaint before the Tribunal without the leave of the Tribunal.

(3) Subsection (2) does not affect the operation of section 38 (Procedure of Tribunal generally) of the *Civil and Administrative Tribunal Act 2013* in relation to evidence given before, or findings made by, the Industrial Relations Commission.

(4) (Repealed)

97 (Repealed)

98 Fees or rewards for representing parties

(1), (2) (Repealed)

(3) A person, other than an Australian legal practitioner, is not entitled to demand or receive a fee or reward that is provided for the purpose of representing a party in proceedings before the Tribunal relating to a complaint.

(4) (Repealed)

98A Costs—court may have regard to certain matters

(1) If:

(a) proceedings have been instituted under this Part against a respondent to a terminated complaint; and

(b) an applicant or respondent has made, or makes, an offer to settle the matter the subject of the complaint; and

(c) the offer was or is rejected;

the Tribunal, court, or a judge of the court, in deciding whether to award costs in the proceedings, may have regard to the offer.

(2) If:

Commented [AU17]: This amendment was made to the ARCHA as a result of Recommendation 19 of the PJCHR: 3 155 The committee recommends that the Australian Human Rights Commission Act 1986 be amended to make explicit that, subject to the court's discretion, an applicant pay a respondent's costs of future proceedings if they are unsuccessful or if the respondent has, at any earlier point, offered a remedy which is at least equivalent to the remedy which is ultimately ordered

The provisions may be better placed within the NCAT legislation, however they are provided here for the purposes of illustration

(a) proceedings have been instituted under this Part against a respondent to a terminated complaint; and

(b) an applicant or respondent, or the applicant's or respondent's legal representatives have acted unreasonably

the Tribunal, court, or a judge of the court, in deciding whether to award costs in the proceedings, may have regard to the offer.

[Please contact Mark Sneddon if the Committee has any questions concerning this supplementary submission.](#)

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Australian Registered Charity

Commented [AU18]: This amendment would give effect to Recommendation 11 of the PJCHR:
The committee recommends that, where the conduct of the complainant or practitioner has been unreasonable in the circumstances, the Australian Human Rights Commission be empowered to make orders, on a discretionary basis, about reasonable costs against practitioners and complainants in order to prevent frivolous claims