

**Submission
No 190**

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

Organisation: The New South Wales Bar Association

Date Received: 21 May 2020



SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

Anti-Discrimination Amendment
(Complaint Handling) Bill 2020 (NSW)

21 May 2020

Promoting the administration of justice

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practice in NSW. We also include amongst our members Judges, academics, and retired practitioners and Judges. Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's members, including its Diversity and Equality Committee. If you would like any further information regarding this submission, please contact the Association's Director of Policy and Public Affairs, [REDACTED]

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A. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the New South Wales Parliament's Portfolio No 5 Committee for the opportunity to make submissions regarding the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (**the Bill**).
2. Anti-discrimination law is a complex area aimed at protecting those in society who have faced unfair and unlawful treatment, either directly or indirectly, and promoting equal opportunity for all people. The *Anti-Discrimination Act 1977* (NSW) (**the Act**) seeks to balance the rights and interests of complainants with the interests and rights of respondents alleged to have committed a discriminatory act. It does this through safeguards including the discretionary powers given to the President of the Anti-Discrimination Board (**the Board**).
3. It is crucial that any amendments to the Act support and maintain its purpose of remedying discrimination and do not unnecessarily or adversely limit the power of the Board to investigate and deal with claims.
4. The Association holds two primary concerns about the Bill:
 - a. First, the Bill would remove important discretionary powers of the President regarding whether a complaint is accepted or declined; and
 - b. Second, the Bill would give effect to policy determined in direct response to a select minority of very specific cases that are not representative of the majority of matters presented to the Board.

B. Recommendation

5. Accordingly, the Association recommends that the Bill should not be passed and the discretionary elements of the Act should remain in force.

C. Background of complaints under the Act

6. The Board is the independent statutory body that administers the Act. Its role includes answering enquiries from individuals and organisations, conciliating complaints and promoting awareness about the impacts of discrimination on society and on individuals.¹
7. If an individual experiences harassment or discrimination, they are able to lodge a complaint with the Board as long as certain requirements are met. A complaint may also be made on behalf of someone else, as long as the individual who experienced the harassment consents.
8. The behaviour complained of must be covered within the Act, meaning that it must have occurred because of the individual's sex, race, age, marital or domestic status, sexuality, disability, carers' responsibilities or transgender status.²
9. Further, the conduct must have occurred during employment, in the provision of goods and services, during state education, when obtaining or occupying accommodation, or in a registered club.³ A complaint of vilification can also be made.
10. The discrimination or harassment that is being complained of must have occurred within 12 months of making the complaint, however a delayed complaint may be heard by the Board under some circumstances.⁴ Complaints are lodged in writing either through the complaint form or by writing directly to the President of the Board.⁵
11. Under the Act, the President may decline a complaint if:
 - a. the act in question is not covered under the Act;⁶
 - b. the conduct complained of occurred more than 12 months before the complaint was lodged;⁷
 - c. the conduct complained of could contravene a provision of the Act for which a specific penalty is imposed;⁸
 - d. the complaint is one of vilification and section 88 requirements are not met; and
 - e. the complaint is not being made by or on behalf of the person named in the complaint.⁹

¹ Anti-Discrimination NSW, *What we do: Anti-discrimination NSW*

https://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_aboutus/adb1_aboutus.aspx.

² Anti-Discrimination Board of NSW, *Factsheet: Complaining to the Anti-Discrimination Board* (Factsheet, August 2015) 1

https://www.antidiscrimination.justice.nsw.gov.au/Documents/Making-a-complaint-factsheet_Aug2015.pdf.

³ Ibid.

⁴ Ibid.

⁵ Ibid 3.

⁶ *Anti-Discrimination Act 1977* (NSW) s 89B(2)(a).

⁷ Ibid s 89B(2)(b).

⁸ Ibid s 89B(2)(c).

⁹ Ibid s 89B(2)(d).

12. The President may decline a complaint after the initial application or may accept the application, investigate the matter and then decline the complaint. The President may decline a complaint after an initial investigation if:
 - a. the complaint is frivolous, vexatious, misconceived or lacking in substance;¹⁰
 - b. the conduct complained of is not covered under the Act;¹¹
 - c. the nature of the conduct complained of does not warrant further action;¹²
 - d. another remedy is being pursued;¹³
 - e. another body should pursue the complaint;¹⁴
 - f. the respondent has remedied the harassment;¹⁵ or
 - g. it is not in the public interest to pursue the complaint.¹⁶
13. If the President declines a complaint after the initial investigation for one of these reasons, the complainant may, within 21 days of receiving notice of the President’s decision, require the President to refer the complaint to the New South Wales Civil and Administrative Tribunal (NCAT).¹⁷
14. The role of the Board is to facilitate conciliation between the complainant and the respondent. This involves a settlement proposal — financial or otherwise — presented at a conciliation conference with the aim of reaching a conciliation agreement between the parties. If the complaint is not resolved within 18 months, the President can refer the matter to NCAT.
15. Through this process, many factors are taken into consideration, including:
 - a. *Fairness to the complainant* — This involves allowing complainants the opportunity to be heard about the harassment they allegedly experienced;
 - b. *Fairness to the respondent* — This involves allowing a fair opportunity to respond in reply to the complaint put against the respondent;
 - c. *The Courts* — That, by facilitating conciliation, the Courts are not overwhelmed by claims of harassment that could be resolved in other ways. Making the Board the first step in resolving a claim of discrimination also assists in minimising costs to both parties.

¹⁰ Ibid s 92(1)(a)(i).

¹¹ Ibid s 92(1)(a)(ii).

¹² Ibid s 92(1)(a)(iii).

¹³ Ibid s 92(1)(a)(iv).

¹⁴ Ibid s 92(1)(a)(v).

¹⁵ Ibid s 92(1)(a)(vi).

¹⁶ Ibid s 92(1)(a)(vii).

¹⁷ Ibid s 93A.

D. The importance of retaining discretion

16. Currently, when an individual makes a complaint under the Act about an alleged incident of discrimination, the President has discretion as to whether or not to pursue the complaint. This is because subsection 89B(2) provides that the President “may”, rather than “must”, decline a complaint under certain circumstances.¹⁸
17. Schedule 1 item 3 of the Bill would remove this entirely by directing that the President “must” decline a complaint in the circumstances outlined. This would transform the discretion to decline inappropriate complaints into a blunt instrument that may result in the premature rejection of complaints that should merit further investigation.
18. Further, schedule 1 item 4 of the Bill expands the circumstances in which a complaint must be declined by including seven other instances. These include where the President is “of the opinion that” the complaint is considered to be frivolous, vexatious or misconceived, if the respondent has made public statements relating to the complaint and was a resident of another State or territory or not in NSW, or if the respondent has a cognitive impairment.¹⁹ The threshold in the proposed draft paragraphs 89B(2)(f), (g) and (i) that the President must be of “of the opinion that” a particular circumstance exists is a lower bar than the requirement in the existing section 92(1) of the Act which requires that a President be “satisfied” of particular conduct occurring before the President may decline the complaint.
19. Similarly, schedule 1 item 7 of the Bill would remove the President’s discretion to decline a complaint at any stage of the investigation by providing that the President “must”, rather than “may”, decline the complaint if satisfied of the circumstances outlined in subsection 92(1) of the Act.
20. The discretion of the President is an important element in the investigative process as well as in the resolution of complaints. It ensures that there is flexibility with regard to complaints and that members of the community are able to fairly have their issues heard and potentially addressed by conciliation. The President’s discretions ensure that the rights of complainants to be heard are appropriately protected by the powers of the Board and may access the investigative process, while also ensuring that the Board’s time and resources are not wasted on claims that have no merit. These discretions provide important safeguards for respondents against the progression of unwarranted or inappropriate claims.
21. The Association considers that subsection 92(1) of the Act already provides sufficient protection against the progression of complaints that are inappropriate, including complaints

¹⁸ Ibid s 89B.

¹⁹ The Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW) cl 89B(2)(f)-(l).

that are “frivolous, vexatious, misconceived or lacking in substance” or where another appropriate remedy has been or should be pursued.²⁰

22. Further, as mentioned above, if under the Act the President declines a complaint after initially accepting it, the complainant has a right to appeal to NCAT under section 93A. Schedule 1 item 11 of the Bill removes that right of appeal. This means that when a matter is declined by the President after an initial investigation, there is no right for the individual to have it appealed or heard by another body.
23. The right of review is an important element of the fairness of the process of hearing complaints. By removing this, the Bill removes another important oversight mechanism and protection.
24. The Hon Mark Latham MLC stated in his Second Reading Speech that “the threshold for the acceptance of complaints at the Anti-Discrimination Board is minimal”,²¹ noting that there is no fee for lodging a complaint and no requirement for the President to decline a complaint.
25. While there is no requirement for the President to decline a complaint, there is no requirement for the President to accept every complaint. Removing this discretion, as the Bill does, is an unnecessary step that would upset the balance between the rights and interests of complainants and respondents, and may adversely impact upon the administration of justice.
26. It is important that discretion is maintained to allow the Act the requisite flexibility and not limit the scope of assistance that the Board is able to provide.

²⁰ *Anti-Discrimination Act 1977* (NSW) ss 92(1)(a)(i), (iv).

²¹ New South Wales, *Parliamentary Debates*, Legislative Council, 27 February 2020, (Mark Latham) (*Anti-Discrimination Amendment (Complaint Handling) Bill 2020 Second Reading Speech*).

E. Narrow Framework

27. The Association considers that sound policy should be informed and evidence-based, flexible and applicable to a wide range of cases and people. Reactive legislation drafted in response to subjective perceptions about the outcomes of individual cases risks creating unintended consequences for other cases.
28. In the area of anti-discrimination law, it is imperative that legislators put in place frameworks that possess sufficient flexibility to consider and deal appropriately with a wider, rather than a narrower, range of matters.
29. The Association is concerned that the proposed Bill is too narrowly focused in approach, as it seeks to amend the Act based on three very specific instances that do not appear to be representative of the cases put to the Board as a whole.
30. The Private Member's Second Reading Speech cited specific instances where it is considered that decisions of Board were unjust and demonstrated the Act's ineffectiveness. In these circumstances, the Association does not consider it appropriate to make comment on individual cases or outcomes and holds concerns about legislating on the basis of such commentary.
31. Further, the complaints of a small number of individuals should not be a reason for so drastically amending legislation that has a wide-ranging positive impact on a large number of people. Other remedies should be explored for individuals who feel wronged by the operation of the legislation prior to proposing a significant amendment of the Act.
32. Amending the Act in the manner proposed in the Bill may adversely impact on victims of discrimination or harassment who approach the Board to assist them to resolve their complaints, as there is a real risk it could prevent genuine claims from being heard, or at least further investigated and resolved.
33. While it has been argued that appeals to NCAT can cause stress for respondents, the vast majority of cases that appear before NCAT are not subject to media scrutiny or publicity. The interests of the respondent must be balanced with the rights of the complainant to be heard. This balance should be calibrated by reference to the majority of matters, not by reference to a small handful of unique circumstances.
34. In 2018-2019 the Anti-Discrimination Board finalised 941 complaints.²² Of those complaints, 26.6% were settled before, at, or after conciliation, 12.1% were declined before investigation (leaving no right to appeal to NCAT), 18.5% of complaints were referred to NCAT and 37.4% were abandoned or withdrawn. Importantly, this data shows that over 75% of complaints were not addressed by NCAT. This is significant as it demonstrates that

²² Anti-Discrimination Board, *Anti-Discrimination Board of NSW Annual Report 2018-19* (2018) 12.

these complaints are not substantially burdening the system and that conciliation is a useful and effective tool in addressing discrimination.

35. This data also highlights the importance of the development of policy that focuses on the needs of the whole, not just the individual. As the data indicates, as the Act operates now, complaints are being handled adeptly and clearly successfully, as most matters are being dealt with by the Board and not by NCAT. The Bill does not accurately reflect the way complaints are being handled. If the Bill were to pass and the Act amended, while it is likely that the number of complaints declined and the number of complaints referred to NCAT would both decrease, it is likely that a significant amount of genuine complaints would fall through the cracks and unlawful discrimination will be left unchecked. It is not in the public interest to allow unlawful discrimination to go unaddressed.
36. The Bill would not facilitate justice. There is a risk it may instead potentially silence victims of discrimination or harassment, disincentivise genuine complainants, and empower discriminators and wrongdoers to continue unlawful behaviour.

Conclusion

27. In conclusion, the Association recommends that the Bill should not proceed.
28. The Association would be pleased to assist the Committee with any questions it may have. Please contact the Association's Director of Policy and Public Affairs, [redacted] at first instance if you would like any further information or to discuss this submission.