REPORT ON PROCEEDINGS BEFORE

PORTFOLIO COMMITTEE NO. 5 - LEGAL AFFAIRS

ANTI-DISCRIMINATION AMENDMENT (COMPLAINT HANDLING) BILL 2020

CORRECTED

At Sydney on Tuesday 9 June 2020

The Committee met at 10:15

PRESENT

The Hon. Robert Borsak (Chair)

PRESENT VIA VIDEOCONFERENCE

Ms Abigail Boyd
The Hon. Rose Jackson
The Hon. Trevor Khan
The Hon. Mark Latham
The Hon. Natasha Maclaren-Jones
The Hon. Shaoquett Moselmane
The Hon. Natalie Ward

The CHAIR: Welcome to the first hearing of the Portfolio Committee No. 5 Legal Affairs inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020. Before I commence, I would like to acknowledge the Gadigal people, who are the traditional custodians of this land. I also pay respect to the Elders past and present of the Eora nation and extend that respect to other Aboriginals present. Today is the first of two hearings we plan to hold for this inquiry. We will hear from Anti-Discrimination NSW, the Institute for Civil Society, the Human Rights Law Alliance and the New South Wales Gay and Lesbian Rights Lobby.

Before we commence I will make some brief comments about the procedures for today's hearing. Like so many other things that we needed to adapt to in the face of the COVID-19 health measures, the hearings for this inquiry will be conducted via videoconferencing. This enables the work of the Committee to continue without compromising the health and safety of members, witnesses and staff. This is new territory for upper House inquiries and I ask for everyone's patience and forbearance through any technical difficulties we may encounter today. If participants lose their internet connection and are disconnected from the virtual hearing, they are asked to rejoin the hearing using the same link provided by the Committee secretariat. Today's hearing is being broadcast live via the Parliament's website. A transcript of today's hearing will be placed on the Committee's website when it becomes available.

All witnesses have a right to procedural fairness according to the procedural fairness resolution adopted by the House in 2018. There may be some questions that a witness could answer only if they had more time or had certain documents to hand. In those circumstances witnesses are advised that they can take a question on notice and provide an answer within 21 days. I remind everyone today that Committee hearings are not intended to provide a forum for people to make adverse reflections upon others under the protection of parliamentary privilege. I therefore request that witnesses focus on the issues raised by the inquiry's terms of reference and avoid naming individuals unnecessarily. Finally, I ask everyone to mute their microphones when they are not speaking so that background noise is minimised.

ANNABELLE BENNETT, President of the Anti-Discrimination Board, before the Committee via videoconference, affirmed and examined

The CHAIR: I welcome our first witness, Dr Annabelle Bennett. Dr Bennett, would you like to start by making a short opening statement? If so, could you please keep it to a couple of minutes.

Dr BENNETT: Yes, thank you. I will. I welcome the opportunity to discuss the proposed Anti-Discrimination Amendment (Complaint Handling) Bill 2020. As the part-time President of the Anti-Discrimination Board I will do my best to provide information to assist this inquiry. I will assume that you are all familiar with the Anti-Discrimination Act 1977 and the application of that Act to render unlawful racial, sex and other types of discrimination in certain circumstances, and to promote equality of opportunity between all persons. You would also appreciate that my functions are administrative in nature and not determinative. A primary role of the complaint mechanism is to conciliate between the parties. The functions provided for the president through delegation do not extend to making decisions on the merits of a complaint of discrimination. If conciliation cannot be achieved and the complaint is accepted and maintained, it is referred to the NSW Civil and Administrative Tribunal [NCAT].

With respect, it is important to put the work of the board and of Anti-Discrimination New South Wales [ADNSW] into perspective. Since its inception the board has dealt with thousands of complaints—approximately 1,000 complaints a year since 2005. It is fundamental that those complaints are afforded—as they are—procedural fairness in recognition that our responsibility is to both complainant and respondent. Any beneficial legislation can, in the words of the second reading speech for this bill, be at risk of what is called "misuse". However, this should be gauged against the evidence.

Without wishing to burden the Committee with detailed statistics it is worth noting that in the last five years, according to the annual reports, on average 8.5 per cent of complaints were settled before conciliation and 17 per cent at conciliation; 19 per cent were declined under section 89B, and a further 8 per cent under section 92, and did not proceed further; 17 per cent were withdrawn by the complainant and 15 per cent were abandoned; 4 per cent were referred to NCAT after being declined under section 92, where leave is then required from NCAT to proceed; and 13 per cent were referred to NCAT for other reasons that included the formation of an opinion that the complaint cannot be resolved. In accordance with normal provisions of administrative law certain decisions of the President under the Act can be referred to NCAT and others to the Supreme Court. I do not propose to canvass; nor should I give an opinion on the circumstances of referral of board decisions to NCAT.

The bill is primarily concerned with the decision to accept or decline a complaint—that is, each complaint must be considered to determine whether it is to be accepted or declined. This brings in consideration of sections 89B and 92 of the Act and it is important that those sections are read together. Section 89B applies at the beginning, on lodgement of the complaint. Section 92 applies at any time after lodgement during the investigation of the complaint. Section 89B is prior to any investigation—the sort of investigation which would be necessary to determine some of the matters proposed to be inserted into section 89B, such as whether a complaint has substance. Rather, section 89B applies to matters that could be said to be apparent on the face of the complaint, such as when there is no contravention of the Act made out or the time since the event occurred is too long. I will return to other positive possibilities for section 89B in a moment.

First and importantly I must emphasise the importance of maintaining discretion on the part of the president or the delegate to make the relevant decision. Hopefully it is not necessary to elaborate on the important distinctions between mandatory and discretionary decision-making, nor the potential consequences of providing only specified limitations and considerations for decision-making. In circumstances where the factors that are present cannot be anticipated it is crucial that the discretion to determine whether a complaint be accepted or declined, at any stage of the process, be maintained.

I said that the two sections should be read together. That is because, in the present context, many of the matters sought to be introduced into section 89B are not able to be determined without investigation and are already provided for in section 92. Examples include a conclusion that there is a more appropriate remedy, or that the complaint has been dealt with or should be dealt with by another authority. I remind the Committee that section 92 provides for considerations such as the complaint being frivolous, vexatious, misconceived or lacking in substance and, importantly, for reasons of public interest or "any other reason" to take no further action on the complaint or part of the complaint. While such a decision must, on the request of a party, be referred to NCAT, a party requires leave from NCAT to proceed to challenge such a decision.

Let me return to section 89B. I see some merit in providing for other considerations to determine in the exercise of discretion whether a complaint is accepted or declined, without the need to undergo investigation and the consequent utilisation of resources. One might be the proposed section 89B (2) (f), which states:

> … the President is of the opinion that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance…

I would not include "lacking in substance" as that requires investigation and is better dealt with under section 92, where such provision exists. If I may, I would suggest that consideration might be given for an additional provision that extends to a vexatious complainant. I also see merit in a provision enabling the decline of a complaint where it has been dealt with by the president, or an authority of the State or the Commonwealth.

I will make three other general observations and then I will close. First, questions of jurisdiction by reason of the residence of the respondent are currently under consideration by the courts. Generally speaking, so far as I am aware, there are matters of legal complexity in the use of and receipt of information over the internet and social media, including where it can be said that the statement was made. Secondly, care should be taken in the insertion of specific definitions that may be inconsistent with existing definitions or already encompassed by other definitions presently in the Act.

Thirdly, care should be taken not to introduce uncertainty into the construction of the Act by providing for specific considerations which limit the broad discretion presently available. I must repeat: I am most strongly of the view that any attempts to change the discretionary "may" to a mandatory "must" in either section 89B or section 92 are misconceived, serve no purpose, would inhibit the work of ADNSW, be contrary to the public interest, have no demonstrated need or benefit and could well undermine the protections appropriately governed by the Act. Thank you.

The Hon. SHAOQUETT MOSELMANE: Dr Bennett, I appreciate you coming in. I read your submission. It is pretty comprehensive in the various areas that you have covered with response to the suggested bill. Do you see any room for improvements of complaints handling?

Dr BENNETT: I did actually just raise two matters there, both of which would be of assistance. Of the two that I dealt with, One would be to give some discretion at the stage of lodgement, before investigation. I do personally see some benefit in those two matters. Otherwise, as you will see from the statistics, it is running pretty well. If you look at the way the complaints are handled, they are handled across a range of opportunities and in my opinion it seems that they are being dealt with appropriately.

The Hon. SHAOQUETT MOSELMANE: There has been a continuous complaint that there are vexatious claimants and some are malicious in the way that they are being pursued. What is your response to that? The crux of this complaints handling is that there are vexatious complainants that keep coming back for the same bite of the cherry and are, as a result, causing so much consternation and cost to the board and to the Government and also to the respondent in this regard.

Dr BENNETT: I will make three points there. The first is that the Act requires us to look at each complaint. I had suggested in my opening that there could be provision—there is already provision at the investigation stage to decline a complaint if it is vexatious et cetera. I think it would be helpful to have that discretion at the lodgement stage under section 89B if the complaint was vexatious. I have also suggested—which is a new thing that has not been suggested, even in the proposed bill—that there could be a provision for dealing with a vexatious complainant. At the moment we only have a complaint, one by one. We do not have the opportunity at the moment to look at a vexatious complainant.

I am of the view that that could be helpful at the lodgement stage. We do have that ability at section 92 because once we have investigated it we can decline a complaint "for any other reason", which would include all sorts. There is no limitation at the moment on that discretion, so we are able to deal with it at that stage. If we had that ability to deal with it at the lodgement stage that could be of assistance, but otherwise we are obliged to look at each complaint on its face as it is lodged. If that complaint on its face is a valid complaint then it gets accepted at the lodgement stage and proceeds to investigation.

The Hon. SHAOQUETT MOSELMANE: So you are suggesting that a vexatious complainant could be looked at early on in the piece. Is that right?

Dr BENNETT: Yes. At the moment we do not have any provision for dealing with a vexatious complainant. If we have that discretion at the lodgement stage—we do have it at the section 92 stage—that could be beneficial.

The Hon. SHAOQUETT MOSELMANE: On page 1 of your submission you state:

> Removing existing rights of review would be out of step with principles of administrative law and may also risk reducing the protection of existing rights of the community in NSW.

I understand that. Can you elaborate a bit more on this?

Dr BENNETT: Well, I know a lot has been made about potential misuse and resources. Speaking from my own experiences in the past because I had to deal with the judicial side of things, one could argue that there is an appropriate route—you could argue that people are overusing the system everywhere. People get rights of appeal in all situations and that is considered to be appropriate in administrative law situations. The fact that some people may misuse that, from my perspective, personally, is not a reason to undermine a system. There are two ways of dealing with what we do. You see from the statistics that a lot of matters, when we decline and will deal with them, go no further. Some go to NCAT but actually the statistics show that it is not that many.

If we make the wrong decision at the section 89B stage, that is subject to judicial review by the Supreme Court because that is like what I would call a jurisdictional decision. They would be saying there is no jurisdiction. That goes to the Supreme Court. I do not know of any cases where that has occurred. If we decline later it goes to NCAT but NCAT has to give leave for that matter to proceed. So I do not see the administrative law side of it being inappropriate. If you look at the court system, they have litigants in person, for example, who take up a lot of time. What do you do? Do you say that people who do not have lawyers cannot appear? Of course there is a difficulty with maintaining the system with the checks and balances, but it is important to give, as we have all said, procedural fairness. Indeed, in the opening statement of this Committee that comment was reinforced. I think there is an appropriate balance there. When you look at it, it is not many cases that are going on. Most of the cases go through seamlessly.

The Hon. SHAOQUETT MOSELMANE: You have indicated in your opening statement that about 17 per cent of the applications are withdrawn and another 15 per cent are abandoned. I hope I have got that right. Are they encouraged to be abandoned or withdrawn or do applicants suddenly withdraw or abandon their application? What is the process? What is the background of the statistics?

Dr BENNETT: I do not have my own knowledge of the multitude of circumstances that can arise with that. If you wanted more detail on that I would have to take that on notice. People can abandon their complaints for a multitude of reasons and I do not have any statistics available to me at the moment that would enable me to answer that question appropriately.

The Hon. SHAOQUETT MOSELMANE: You have also said that the board is looking, at the moment, at the jurisdictional issues. That is currently under consideration by the board. Can you tell us a little bit more about that?

Dr BENNETT: I can only say that we are well on the way to completing our internal investigation. We cannot do everything because some matters would need to go to public consultation, of course, before any decision was made. But we are well on the way in our process of recommending—we are doing two things. We are identifying areas that could be looked at again or would need to be looked at, but also other areas that we hope could be dealt with expeditiously.

The Hon. SHAOQUETT MOSELMANE: Two more questions. One: Having read the bill, are there any suggestions in the proposed bill that could be adopted or could be fine-tuned to be adopted by the Committee?

Dr BENNETT: Yes. I think I actually referred to one in my opening. I am trying to remember exactly which one it was. I have lost my sheet of paper that has a particular reference on it. It was the one that does give us the right, at the section 89B stage, to deal with vexatious and frivolous—but not lacking in substance. Once you are looking at lacking in substance, that has to go to an investigation. That was one. The other was to perhaps give us the right to look at a vexatious complainant. That was not in the proposed bill. That is an additional one that I have identified.

The Hon. SHAOQUETT MOSELMANE: Anything else that could be perhaps streamlined or modified?

Dr BENNETT: I do not think it is a question of streamlining. I absolutely cannot emphasise sufficiently that we should have the discretions. If you think about general statutory construction—if I may say with respect, all you do when you put specific things in a mandatory situation is limit what can be done. You do not expand it. If you have got indications of what should be taken into account but there is a discretion, that actually provides for a much more efficient and a better-run system, in my view. I certainly would not support any suggestion—in fact, I oppose any suggestion of turning it into mandatory. Everything that has been raised in the proposed bill at the section 89B stage is otherwise provided for in section 92. Some of those suggestions go to topics you cannot make a decision about until you investigate. You cannot decide if somebody has a cognitive impairment and you

cannot decide if it lacks in substance until you investigate it. Once it gets to that stage, at any stage of the process you can decline it if you decide it is lacking in substance. Otherwise I do not see that it helps, if I can call it that.

The Hon. SHAOQUETT MOSELMANE: My last question is about the cognitive issues. How does the board handle matters of cognitive impairment? What is the process?

Dr BENNETT: It would vary very much with each individual case. I cannot myself at this moment give you the details of the sorts of examples of how that would be dealt with. It would have been very much on the nature of the complaint and what information the respondent can give to enable someone to make an evaluation, bearing in mind that after a complaint is accepted we turn to the respondent to ask the respondent to give information that would assist.

The Hon. SHAOQUETT MOSELMANE: Finally, I said in my opening question about the ongoing complaints that there are problems with the complaints handling. How did the board address those over the years?

Dr BENNETT: I am sorry. I do not quite understand which problems you are referring to. Can I ask you to clarify that?

The Hon. SHAOQUETT MOSELMANE: People complaining about the fact that the complaints handling has been problematic where it allowed vexatious claimants and even malicious applications that have caused some respondents ongoing harm. How did the board address those particular complaints from the public?

Dr BENNETT: Well, I am not aware of exactly what complaints from the public we have been having. Again, I think our processes have got to be dealt with objectively and we have to deal with each complaint as it comes in. The complaint comes in. It is investigated on its face. It is an accepted or declined. If matters evolve later, with information from the respondent, that it should be declined, then the president or the delegate will make a decision to do so. Bearing in mind that we are dealing with a conciliation process—that also comes to bear. Either matters conciliate or they do not. I am finding it difficult to respond more specifically because I do not have the actual information before me that we are talking about, if you know what I mean. I am speaking in the abstract.

The Hon. SHAOQUETT MOSELMANE: Thank you very much, Dr Bennett. Thank you, Chair.

The CHAIR: Any other questions from Labor?

The Hon. NATALIE WARD: I think Rose Jackson is trying to say something but she cannot be heard. She is waving her hands around. We cannot hear you, Rose. I think your time has finished, anyway.

The CHAIR: Rose, you will have to log off and try again. We are not getting anything.

The Hon. ROSE JACKSON: Can you hear me now?

The CHAIR: We have got you now.

The Hon. NATALIE WARD: Your time is finished now.

The Hon. ROSE JACKSON: I could not figure out how to get off mute but I am off mute now. Thank you. Has the time now expired?

The CHAIR: Your time has expired, yes.

The Hon. ROSE JACKSON: Great.

The Hon. TREVOR KHAN: Dr Bennett, my name is Trevor Khan. Good morning.

Dr BENNETT: Good morning.

The Hon. TREVOR KHAN: I note that in your submission and your opening you referred to the issue of the vexatious complainant. It is no surprise, I suspect, that that is a matter of interest to a number. Excepting if I see merit in that, would you like to expand on how you see, at the section 89B stage, identifying a complainant as being a vexatious complainant?

Dr BENNETT: Well, first I must make it clear—of course, I cannot comment on individual complaints.

The Hon. TREVOR KHAN: I am not expecting you to.

Dr BENNETT: I am not allowed. Secondly, let me make one thing absolutely clear: Having had years of experience in the court process, declaring someone a vexatious litigant is a very serious and careful case. It is not easy to get that decision out of a court, if you know what I mean. I know because I have been in cases that have tried, as a barrister. Having said that, we have not had that ability at the 89B stage. I think it would be useful to have it. All I can say is if the history of a particular complainant with the board was such that it became clear, either by, for example, somebody putting in the same complaint in different names or somebody putting the same

complaint in over and over and over again—I am just hypothesising now, off the cuff. I think that there could be circumstances where—if you looked at the complaint and then you looked at the complainant and what had happened with the board's processes and that complainant—you could get to a situation where somebody would form the view that either the complaint was vexatious or the complainant was vexatious.

The Hon. TREVOR KHAN: Would that be a declaration made by the president or would it be an application made by NCAT, for instance?

Dr BENNETT: No. If it was added into the existing sections then the president would accept or decline the complaint under section 89B at lodgement or, as I said, later at any stage during the investigation. In section 92 you already have the ability to decline for a vexatious complaint.

The Hon. TREVOR KHAN: I think I understand. Can I just go to 89B? We have talked about the issue of discretion. It strikes me that the various matters referred to in 89B (2) perhaps fall into various shades of grey. For instance, if I go to 89B (2) (a), that is a complaint where, I quote:

> … no part of the conduct complained of could amount to a contravention of a provision of this Act or the regulations …

Can we consider circumstances where you would envisage that a complaint that seems to be so lacking would not result in the discretion to chuck it out?

Dr BENNETT: Do not forget it says complaint or part of a complaint. There could be matters where it was not a ground that is covered by the Act. Part of it could be and part of it could not be. Sometimes people allege discrimination not understanding that you have got to have a statutory ground to do so or it does not amount to what could properly be characterised as discrimination.

The Hon. TREVOR KHAN: It may be an allegation of discrimination of something that does not fall within one of the identified headings?

Dr BENNETT: Exactly.

The Hon. TREVOR KHAN: If that were the case, is there really an issue with the exercise of the discretion? If it was arguing over something not related to the current heads, would it be—

Dr BENNETT: Sometimes you need to have an investigation to be able to determine that. On the face of it, it might look as if it has. It says it could amount to a contravention. I do not want to get into legal statutory construction questions here, but it says that it could. It would be helpful to have a discretion because you might decide that there is just enough there to take it a bit further and seek further information before you could come to a firm decision. Bearing in mind that you are trying to help a lot of [inaudible]—you are trying to deal with a situation where not every complainant is legally represented, where they do not necessarily come with easy stories or with particularly crystallised stories. So there should be a discretion to form that view one way or the other, and you may not actually get to the point where it is a hard and fast one. You may wish to take it further into a bit more investigation before you can make recommendations.

The Hon. TREVOR KHAN: I am not going to go through each, but could we go to (e) in that subsection?

Dr BENNETT: Yes.

The Hon. TREVOR KHAN: On the face of it, you come to the view that the complaint is not actually made by or on behalf of the complainant. I might have misinterpreted it, but are there any circumstances where what I think you would essentially say is a fraudulent complaint would continue on through the process?

Dr BENNETT: Well, what do you mean by fraudulent? I mean, that could cover a situation where somebody says they are doing it in a systemic nature and you cannot say it is on behalf of the main person. Sometimes you need to investigate that further before you can determine that. That is not really a fraudulent situation. I do not think (e) is meant to cover only fraud. It is more of a complaint said to be on behalf of somebody else named in the complaint. I do not think that is necessarily fraud. But if you determined it was fraudulent, that really goes to the condition of the authorisation. It is really going to whether or not it is the person who has authorised the complaint being there, not a guardian, not a parent. It is matters such as that in (e). As I said, I would not mind having something in 89B that adds in vexatious or frivolous, because that would be of assistance. That is what we do not have at the moment. Does that answer your question?

The Hon. TREVOR KHAN: I think it does, yes. The final one relates to B. Should there be a requirement that leave is sought with regard to it being outside the 12 months, so that before one starts notifying respondents and the like there is at least some explanation as to why a complaint is pursued outside the 12 months?

Dr BENNETT: Again, I am not getting into individual cases. Do not forget that in my job I am not doing the day-to-day handling of these complaints. I am only going at it from my position.

The Hon. TREVOR KHAN: I am not holding you responsible.

Dr BENNETT: I am responsible. For example, the 12 months is a guideline. It might be that the case is outside 12 months. You say that should go. But you can imagine lots of circumstances where it is outside the 12 months and you would not want to dismiss it. That is exactly why you need a discretion. You do not need leave then, because once it is outside the 12 months you would automatically be targeting that time frame to see if there is a discretionary reason why that 12 months should be applied or not. So I do not see that it helps at all. It is only a further stage because already that is going to be looked at in that scope. Why put someone—she says, rhetorically—to the extra burden or the extra decision of actually seeking leave? It would be considered in that context.

The Hon. TREVOR KHAN: If I could put it this way, seeing these proceedings which involve a respondent, if you have a claim which is—perhaps I will not describe it as wholly unmeritorious but as having significant problems. The question is: Should there be some pre-vetting before the respondent is essentially put to the task of also being engaged in the process?

Dr BENNETT: That is what 89B does and there are certain things set out there that you have to look at. One can seek information from a respondent without pushing the respondent wholeheartedly through the process. If something came from outside 12 months, one example is you might go to a respondent and just say, "Can you give me some information about this?" Without making them get right into the claim. They might then give you sufficient information that would help you determine whether or not to exercise the discretion at the 89B stage.

The Hon. TREVOR KHAN: I had best give my colleague some time. Thank you very much for your assistance.

Dr BENNETT: Thank you.

The Hon. NATALIE WARD: Chair, is there any time left?

The CHAIR: You have got one minute and 51 seconds.

The Hon. NATALIE WARD: I will be quick. Thank you, Dr Bennett, for attending today. My name is Natalie Ward and I appreciate your attendance in assisting the Committee. I have a couple of questions if there is more time afterwards, but I just wanted to ask about the investigation stage. Not being too lawyerly about it, the tradition of *Browne v Dunn* is that you put a proposition to somebody before you seek to discredit it. There has been talk that the investigating stage is really just creating more work. This is not my view, by the way, that the tribunal creates work by investigating these matters, which it really should not be doing, and that sucks up resources and there is a better way.

I just wondered if you might speak to that because it seems that you cannot really come to a view unless you have investigated. I wondered if that was similar to the idea of a tradie being asked to quote on a job before he goes out to see what is involved in the job. You get someone around. They have a look and see what is involved and then give you a quote. Could you comment on the investigative stage of the tribunal and what is actually involved?

Dr BENNETT: Again, it is hard to go into great detail, especially with limited time. The point is once a complaint is accepted it is accepted, and that is a discretionary point. You then have to investigate it and you investigate it in two ways. You can seek further information from the complainant and you then turn to the respondent. Please bear in mind that we are not a tribunal. We do not make a determination. *Browne v Dunn* is not really—

The Hon. NATALIE WARD: I am sorry. That was frivolous of me.

Dr BENNETT: There are two stages then. Do we then move to continue with the complaint? Do we think the complaint can be conciliated, which is really the main point? That is where you get information from both sides. If we formed the view that the complaint cannot be conciliated and there is no point, we would refer it straight onto NCAT, if the parties wanted. But we can also make a decision to decline it if the information suggests, under the various grounds, that for any reason it should be declined. We try to limit the use of resources and the burden to the parties as much as we can.

The CHAIR: Thank you. Time is up.

The Hon. NATALIE WARD: I will come back to that.

The Hon. MARK LATHAM: Hello, Dr Bennett. Thank you for your attendance today. You mentioned the importance of gauging these proposed reforms against the evidence and also acknowledged that it would be helpful for the board to have a power to deal with vexatious complainants, inferring that the problem of vexatious complainants has been manifest for many years. Are you able to answer the questions that I put in letter form to the chairman of this Committee and that has been forwarded to the board to get detailed information about serial complainants? The purpose of the bill is to try to deal with this problem of serial complainants to the board and through NCAT and up the legal ladder.

Dr BENNETT: With respect, Mr Latham, I am not inferring nor accepting that this is a problem that has been manifest for many years. My statements were not meant to say that. Indeed, to the contrary, I thought that the reference to the statistics shows that when you put these things in perspective one cannot say there has been a major problem for many years. Please do not take it that I was saying those matters, or acknowledging or accepting those matters. I do have it. Which question did you want me to answer?

The Hon. MARK LATHAM: One to six on page two of the letter that has been forwarded to you. I am asking for it solely for the reason that all this material was absent from the board's submission to the Committee.

The Hon. SHAOQUETT MOSELMANE: Point of order: I do not have those questions in front of me. Can the Hon. Mark Latham ask those questions so that we know what those questions are?

The CHAIR: Yes. I am reminded that we are going to deal with those questions and answers in an in-camera hearing we are having later in the week.

The Hon. MARK LATHAM: That has been organised already, has it, Mr Chairman?

The CHAIR: Yes, it has.

The Hon. MARK LATHAM: Dr Bennett, if you need a power for vexatious complainants, what has been the extent of the problem with vexatious complainants at the Anti-Discrimination Board?

Dr BENNETT: I find that a very difficult question to answer. First, because I am not able to talk about individual cases, as you would be aware, Mr Latham, certainly not in the public arena. Secondly, I have given the statistics. If you look at the statistics and you see how few of those cases were actually referred to NCAT, then you will see that there is not so much of a problem altogether. Because under 89B or 92 we have not had the power to deal with—I withdraw that. Under 92 one can consider other reasons. I cannot give you the statistics, I am afraid, on what you might categorise—I am not sure. It is a subjective characterisation, a vexatious complainant. It would have to be dealt with in the case of the individual person.

I think that there was going to be an in-camera hearing. It was said that it was going to be postponed until later in June. I should just explain that I am presently, as you may know, a commissioner in the Royal Commission into National Natural Disasters, or the bushfire royal commission. Indeed, I have been given letters patent from New South Wales. I do not know of my own availability later in this month if we have continuous hearings in the commission. I cannot give you an answer because it is a subjective question and I do not have the statistics that would assist me.

The Hon. MARK LATHAM: On the question of forum shopping, it is probably knowing that there is a Queensland resident for whom the board has accepted complaints on 37 occasions. The relevant Queensland discrimination body has not received any complaints at all for that Queensland resident. Queensland has a very clear and firm complaints handling threshold. Does this not indicate that forum shopping is a problem, and that New South Wales has become a soft touch where complaints against Queenslanders, and I suppose people from interstate and around the Commonwealth, can be lodged in our forum when they are not even being lodged in the place where people live?

Dr BENNETT: I take that, Mr Latham, in many ways. If I may say so, with respect, it is a rhetorical question. I cannot answer that. Of course I cannot answer that. I do not know why people lodge in New South Wales or Queensland. These are complex areas. As I said in my opening statement, the law as to where statements are made is a complex legal question both in this sort of area and indeed, for example, in intellectual property cases. I cannot give rise to that speculation and I cannot answer it.

The Hon. MARK LATHAM: So you are telling me that the head of this publicly funded body—and you are publicly funded—has no opinion on the fact that the Queensland jurisdiction has not accepted any of these complaints, because none have been lodged, but in New South Wales we have gone to the public expense of investigating 37 of them, at a time when resources are stretched elsewhere in the New South Wales legal system? Is this not just a cop-out?

Dr BENNETT: It is not a cop-out, Mr Latham. If a complaint is lodged with us we look at the complaint on its face and we accept or decline it based upon the complaint as it is framed. It is then subjected to investigation. As you may be aware, I cannot talk about individual complaints, but I can say that some matters have been referred to NCAT and have gone on jurisdictional questions to the Court of Appeal, the High Court and then again to the High Court. The substance of those I do not think has ever got to a conciliation stage because it has all been done on legal questions of jurisdiction.

Ms ABIGAIL BOYD: Thank you, Dr Bennett, for your very detailed submission and for your attendance today. I want to touch on this idea of vexatious complaints and your comment that perhaps it would be useful if we had that at the pre-investigation phase. Can you recap for me the percentage of complaints that actually are declined on the basis of being vexatious?

Dr BENNETT: No, I am sorry, I cannot give you that. I cannot say how many are declined or how many are vexatious because vexatious is not a factor at the moment at the section 89B stage. I can tell you that 19 per cent on average were declined under section 89B at the lodgement stage. Further, in effect, 8 per cent under section 92 did not proceed to NCAT, and 4 per cent were declined under section 92, where the parties sought to have it referred to NCAT and then NCAT has to give leave. You have 19 per cent declined at 89B; these do not proceed to an investigation. Then, once they proceed to an investigation, 8 per cent were declined and went no further, and another 4 per cent were declined and the parties sought to have it referred to NCAT, where NCAT is to give leave to proceed.

Ms ABIGAIL BOYD: Of the 8 per cent that were declined, plus the 4 per cent that were declined but then went to NCAT, were any of those declined on the basis of vexatious complaint?

Dr BENNETT: I cannot answer that, I am afraid. I know that of the 4 per cent that were referred to NCAT—I just do not know, I am sorry.

The CHAIR: Dr Bennett, would you like to take that on notice?

Dr BENNETT: I will take that on notice. That would be within the existing category, but I would have to take that on notice, I am sorry.

Ms ABIGAIL BOYD: Do you have any statistics for how many complainants are repeat complainants?

Dr BENNETT: I do not know. I would have to take that on notice too. I do not know if there are such statistics. If you mean repeat by more than one, I would have to take that on notice as well, I am sorry.

Ms ABIGAIL BOYD: Thank you, that would be useful to address the idea of there being multiple serial complainants. I would like to see to what extent that problem really is. Then when we talk about having as one of the elements of discretion the ability to decline a complaint at lodgement stage, because you believe it has been vexatious, is that something that is being proposed now as a compromise for what is in the current bill, or is it something that you think would actually be substantially useful? How many vexatious complaints would be refused at that point?

Dr BENNETT: First, I am not in the business of proposing compromises. That is something that we have independently looked to. I am not reacting whatsoever to the proposals in the bill. I did in my opening statement because I was dealing with it, but any view that I am putting as an independent view has nothing to do with the compromise. I think that it would be helpful to have that as one more specified matter that would be available at the section 89B stage in applying the discretion. It is already at section 92. It is already after investigation. You can decline a complaint for it being vexatious after investigation. It is just that if on the face of the complaint that you can see that there is one, then we can deal with that. One other point I would make is that the fact that there are multiple complaints about similar conduct does not necessarily indicate that the complaint is frivolous or vexatious, obviously. In fact NCAT has found that it does not necessarily follow that a multiplicity of proceedings on similar grounds constitute vexation. As you would be aware, the concept of what constitutes vexatious is a very high threshold legally.

Ms ABIGAIL BOYD: Finally, are there any aspects of the Act, if you were doing a review, that would be top on your list for making the board more efficient?

Dr BENNETT: I think in terms of procedural matters—there are other matters that are not procedural—they are not questions of efficiency, they are questions of the fact that some of the language, for example, in the Act is out of date.

Ms ABIGAIL BOYD: So you are not focused on the complaints process as being top of the list of priorities for reform?

Dr BENNETT: The matters that we have raised with section 89B reasonably would. The fact that we would get—no change in the discretion would get that extra discretionary factor, the two—a vexatious complaint and complainant—would be helpful at the 89B stage. The other matters are matters of more substantive issues with the Act, because it is a 1977 Act.

Ms ABIGAIL BOYD: If someone does make a vexatious complaint is there a penalty of any kind or a discouragement?

Dr BENNETT: We are a no-cost jurisdiction, but if during the course of investigation at section 92 it was determined as vexatious and was declined, no, it just does not proceed further.

The CHAIR: That finishes our questioning for this morning with Dr Bennett. Thank you very much for attending.

Dr BENNETT: Thank you very much.

(The witness withdrew.)

(Short adjournment)

MARK SNEDDON, Executive Director, NSW Institute for Civil Society, before the Committee via videoconference, sworn and examined

JOHN STEENHOF, Managing Director, Human Rights Law Alliance, before the Committee via videoconference, sworn and examined

The CHAIR: Welcome. Would either of you like to make a short opening statement? Please keep it to no more than a couple of minutes.

Mr STEENHOF: I would be happy to make an opening statement, Chair. The Human Rights Law Alliance was established in 2019 as a not-for-profit law firm based in Canberra, ACT. We act for parties in all States and Territories of Australia in matters involving freedom of religion or of speech and conscience. We broadly support the bill that is being proposed. Reform of the Act is sorely needed and long overdue, especially in relation to complaint handling. Not only do we think that the modest proposals made in this bill should be passed, but that further amendments to the Act and the Civil and Administrative Tribunal Act 2013 should be made to prevent the misuse of the complaints procedure under the Anti-Discrimination Act for weaponisation by activists and for the suppression of freedom of speech.

Most of the heavy lifting in our submission was done by the Commonwealth Parliamentary Joint Committee on Human Rights inquiry into the Australian Human Rights Commission Act. Many of the recommendations we make for reform of the complaints handling procedures under the Anti-Discrimination Act merely come over from the bipartisan agreements and resolutions that came out of that committee. But rather than go through that, I think it is important to talk about specific cases that we deal with and, in fact, one matter that is before us right now, which I will provide to you in a de-identified form. We have a Queensland resident who we act for who is a mother of four, a small business woman, a photographer, who in January of this year shared on Facebook a petition against the drag queen story times that were being held in Brisbane libraries by the Brisbane City Council. So this a Queensland petition on a local Queensland issue.

In her post she said, "Why do we need to have adult entertainers reading stories to children? Hardly a good role model when many are involved in drugs and prostitution." Shortly after, she received unsolicited emails from someone who has already been identified as a vexatious complainant, who lives in New South Wales, suggesting that this amounted to homosexual vilification under the New South Wales Act. That vexatious complainant gave her an email which was rather uncouth and which ended with the threat of a complaint, saying "if this complaint is accepted by the president I will be seeking an apology and monetary damages." Two days later on Sunday 26 January this complainant sent another email, which was a purported media release that gave our client's full name, address and cell phone number. This is a process known as doxxing, which encourages others to contact our client and to harass them vexatiously.

At the end, this complainant made the quote, "Fellas, I'm just like a vicious Alsatian dog. Once I grab hold of a gay hater's leg, I won't let go until the bone is bloodied and bare. One way or another I will get that remedy"—from our client—"even if it takes me years in court." This correspondence was ignored as it was unsolicited and rather threatening. The next correspondence our client got was from the Anti-Discrimination NSW itself in April, suggesting that it had sent her a letter with a complaint from , that this had been accepted, that it had not heard from our client and that it was threatening to compel her to provide information about the complaint.[1]

The CHAIR: Mr Steenhof, could you refrain from mentioning any names. You mentioned . Please do not do that again.[2]

Mr STEENHOF: Apologies, Chair. Our client came to us and asked us to respond to Anti-Discrimination NSW. We advised it that our client had not received any letter enclosing the complaint. We also advised it that she had received unsolicited communications that she treated as harassment and did not respond to them. We pointed out that she was a Queensland resident, that her post made no reference to homosexuality in any way, shape or form and that she was making a post about a political issue and a matter that related only to Brisbane. We advised the board of the decision of NCAT, which is found in a previous case, that a post made in Queensland is not a public act for the purposes of the New South Wales law, along with a quote that said, "Such

[1] Evidence omitted by resolution of the committee 11 June 2020.

[2] Evidence omitted by resolution of the committee 11 June 2020.

circumstances are beyond the reach of the New South Wales Parliament," and we suggested that the complaint should be declined at first instance under section 89B.

The response we got from Anti-Discrimination NSW was somewhat disappointing. There was no acknowledgement that it had failed to properly serve on our client the complaint. It was a glib response that the notice sent threatening to compel our client, a Queensland resident, to provide information was not threatening and that it was simply the standard response that is given to everybody who does not respond to correspondence. It also took into account our suggestion that the complaint should have been declined at first instance and suggested that we were referring to a High Court decision, which we were not, so it had not even properly looked at the reference we gave to an NCAT decision suggesting that Queensland residents fall outside the brief of Anti-Discrimination NSW.

The CHAIR: Excuse me, Mr Steenhof. I am quite sure that this will come out in evidence, but I asked you for just a short opening statement. I would like you to continue, but I need to go to Mr Sneddon now. When we proceed with questioning, I am sure you can get the rest of your statement on evidence.

Mr SNEDDON: I am the executive director of the Institute for Civil Society, but it would be of interest for the Committee to know that I have served for four and a half years as Crown Counsel to the Victorian Attorney General and the Premier's office under both Liberal and Labor attorneys-general, I have been a partner at Clayton Utz and an associate professor of law at Melbourne University, so I am really speaking as a lawyer here. The Institute for Civil Society is a social policy think tank. The burden of our submission in this opening statement is that there are two clear problems with the current administration of the Act and the complaints process. One is that Anti-Discrimination NSW is accepting and continuing to investigate and conciliate vilification and anti-discrimination complaints which it should have declined to accept or, having investigated it for some time, should have decided to terminate because the complaints were trivial, vexatious, misconceived or lacking in substance.

The second main problem is that Anti-Discrimination NSW seems to be pursuing respondents in other parts of Australia where those respondents have not engaged in any public act in New South Wales; some long-arm jurisdiction which I will leave to members of the Committee to think whether that is a good use of New South Wales taxpayers' money, but it is certainly not commendable from the point of view of comity between jurisdictions and the Federation. We have made a detailed submission as to how the bill and the Act should be amended to deal with these problems and others. I do not have time today and you do not have time to go through in this oral presentation all of those submissions. But if I can just come to the key points. In a review of exactly this same problem in the Australian Human Rights Commission Act—that is to say, the president of the commission taking on and not getting rid of vexatious, trivial and insubstantial complaints—both Labor and Coalition members in the Parliamentary Joint Committee on Human Rights report in 2017 came up with joint submissions to modify complaints handling procedures and to change the discretion and the powers of the president to get rid of, terminate or not accept complaints.

Following that bipartisan report, there was bipartisan support for the passage of the Human Rights Legislation Amendment Act 2017. This was passed and it added three subsections to section 46PH. If the Committee takes nothing else away from my submission today, it is that the New South Wales Parliament should amend the Anti-Discrimination Act complaint handling process in the same way that Labor and Liberal members did in the House of Representatives and the Senate. In particular I draw the Committee's attention to section 46PH of the Australian Human Rights Act. These have been replicated in our version of the Act, but the provisions that were added are as follows:

> The President must terminate a complaint if the President is satisfied that:
>
> (a) the complaint is trivial, vexatious, misconceived or lacking in substance; or
>
> (b) there is no reasonable prospect of the matter being settled by conciliation.
>
> The President must terminate a complaint if the President is satisfied that there is no reasonable prospect that the Federal Court—

in our case NCAT—

> … would be satisfied that the alleged acts, omissions or practices are unlawful discrimination.

And:

> A complaint may be terminated under subsection (1B) or (1C) at any time, even if an inquiry into the complaint has begun.

It is our submission that is the bare minimum which the New South Wales Parliament should enact. It could go further, but I cannot see any reasonable person being able to argue against the president being required to terminate a complaint either at the outset or later on in an investigation if the president is satisfied the complaint is trivial, vexatious, misconceived or lacking in substance, or if there is no reasonable prospect of the matter being settled

by conciliation. There are ancillary provisions around notifying the parties to that, allowing the respondent to make that submission to the president to ask for it to be dismissed and to be notified promptly of the dispute being made et cetera. They are the core elements of what I think needs to happen. On the second problem about accessing or seeking interstate, there needs to be a severe restriction to make sure that it is only a case where public acts in New South Wales have occurred that Anti-Discrimination NSW has jurisdiction. It should be a case that a person making the complaint has suffered detriment in order to justify making the complaint. In summation, they are the key points of our submission, Chair.

The CHAIR: Thank you very much, Mr Sneddon.

The Hon. ROSE JACKSON: Both of the witnesses made mention in their submissions and in their opening statements to the Federal Human Rights Commission changes and suggested that it was bipartisan. I just wondered if they had any comment on the additional report that was submitted by the Labor members of that Federal committee inquiry, where they made really clear that any changes to procedures should not restrict access to justice for people to assert their human rights, because I am not entirely sure that it is accurate to describe that final report as entirely bipartisan. I understand The Greens members of that committee inquiry also issued a dissenting statement in which they placed primacy on access to justice for people who were asserting their human rights. I do not think that that really made it into the submissions from either of your organisations or your statements, so I wondered if you would reflect on that and had any comments on the importance of access to justice under the anti-discrimination legislation in New South Wales?

Mr SNEDDON: I carefully said it was bipartisan, Coalition and Labor. I did not mention The Greens, because you are right, The Greens had a dissenting report in there. As to the principle of access to justice, absolutely, but it was the Australian Labor Party's position to support the changes that went through while upholding access to justice. As I said in my opening statement, it is very difficult to see how a principle requiring the president to terminate a complaint if the president is satisfied the complaint is trivial, vexatious, misconceived, lacking in substance or there is no reasonable prospect of a matter being settled by conciliation is going to limit anyone's access to justice for a reasonable complaint. There must be a threshold which is applied both at the outset and as the investigation unfolds to allow Anti-Discrimination NSW to terminate complaints which lack merit and substance. That is not inconsistent with access to justice. Indeed, it probably promotes access to justice for the people who have meritorious complaints.

The Hon. ROSE JACKSON: I suppose the suggestion would be that the current provisions in the Act already provide for the president to do just that. You may be of the view that the president and their delegates are not exercising their authority in the appropriate way, and you are entitled to draw that conclusion, but that does not necessarily mean that the Act itself is ineffective or needs revision; it just means that, as to the way the discretion is being exercised, you are of the opinion that it should be changed. That does not necessarily require legislative amendment.

Mr SNEDDON: I think the premise of your question is not correct, because I heard the president in her testimony this morning indicate that she did not have any discretion to deal with the complaint on the basis that it might be vexatious or frivolous. My reading of section 89B is that that is correct; she has very limited grounds on which she can decline to accept a complaint. The proposal here is to make a legislative amendment which is cognate with and the same as the one made by Labor and Liberal in the Federal one, to give the president indeed the duty to get rid of a complaint that is frivolous, vexatious, misconceived or lacking in substance if the president is satisfied of that. That power does not exist in the New South Wales Act at the moment and it should go in.

The Hon. ROSE JACKSON: The president agreed, I think, that there should be some capacity at the stage in which an initial complaint is made to reject it on the basis that the complainant was vexatious, but that is quite different to the proposal that is made in the bill, and which your submission supports, to entirely change the nature of that initial complaints handling section to remove discretion entirely. Even in the Federal legislation that was made, the president still had the capacity to make a subjective assessment about the nature of the complaints. The anti-discrimination law is very complicated. As the president explained, many complaints are not prepared by lawyers, they are prepared by individuals who are unrepresented. Some parts of the complaint may have substance, others perhaps not, and to remove discretion at that initial stage would be quite limiting for the president. That was the evidence that the president received, and yet you still think that that would be an appropriate change, that it would not limit justice at all?

Mr SNEDDON: The problem is that in New South Wales you have a real problem demonstrated by the case Mr Steenhof just described, of the person in Queensland and the high-handed attitude of Anti-Discrimination NSW in respect of that complaint, the 37 complaints that have been referenced in other testimony and other cases. What you have is a pattern of Anti-Discrimination NSW not applying for limited discretion that it has in the Act in a way, either at the outset, or during the pendency of an investigation, to terminate complaints which lack

substance or are frivolous et cetera. No administrative decision-maker likes to have their discretion removed, so I completely understand why the president said, "Do not take away my discretion." The proposal put in the Federal Act does not completely take away discretion.

What it does is it requires the president to turn his or her mind to the question as to whether or not the dispute or a complaint is frivolous, vexatious, misconceived or lacking in substance—not an unreasonable proposition, I would have thought. If the president is so satisfied at any point, the president must then terminate the complaint. I cannot see any rational argument as to why that provision should not be put in the New South Wales Act. I cannot see that it is inconsistent with access to justice. If the president decides a complaint is vexatious, frivolous, misconceived or lacking in substance, then it ought not to be entertained by Anti-Discrimination NSW.

The Hon. ROSE JACKSON: I suppose in some ways there are two key elements to the proposed changes to the Act that we are considering: One is the issue of discretion under section 89 and section 92 and the other is the proposal to remove appeal rights to the NCAT. Both of your organisations come to the conclusion that the second proposition should not be supported, but that there should still be rights of appeal. You suggest some other cost-based mechanisms to try to limit them or manage vexatious appeals. Would you comment on that and, in particular, why you think the maintenance of rights of appeal are important?

Mr SNEDDON: Every decision-maker has the capacity to get it wrong. It is the burden of our submission that Anti-Discrimination NSW has been getting the rejection of vexatious and frivolous complaints wrong for some time now. It is entirely possible that it could get wrong a rejection of those for the reasons you have mentioned. Therefore, as part of the rule of law and accountability, it is important to have a right of appeal from a decision to terminate a complaint, and therefore we do not agree with that part of Mr Latham's bill. We recommend that there should be the ability to take that appeal.

But if you have a case where the Anti-Discrimination NSW president has made a decision that a complaint should be terminated on the ground that it is vexatious, frivolous, misconceived or lacking in substance and someone wishes to appeal that, it is time to move from the no-costs jurisdiction to a cost-based jurisdiction. If the complainant wishes to pursue that, they should take on some risk of adverse costs orders against them, otherwise they can just escalate this endlessly through NCAT on and on to the prejudice of the respondent. Remember that we are only having a cost jurisdiction once we have the president of the no-cost jurisdiction saying this is vexatious, frivolous, misconceived or lacking in substance.

Mr STEENHOF: If I could also contribute on that question. We too did not support the full removal of section 93A for the express purpose of that [inaudible] access to justice and that decision-makers at this lower level can get it wrong. We act in a number of jurisdictions, including jurisdictions which protect religious freedom, which New South Wales does not. In many cases where we have had a claim which a commissioner or a board president has said is lacking in substance and dismissed, we have been able to push that through to the relative tribunal and those have in fact turned into substantive cases. We are of the view that the removal of section 93A and the appeal rights is a step too far, but we do see the need to address the problem that it seeks to fix with other methods, such as enlivening costs.

The Hon. NATASHA MACLAREN-JONES: I have a question about what is proposed in the bill in relation to cognitive impairment and how you would set a threshold for that claim, but also how the president would be able to judge what they believe would be an impairment?

Mr STEENHOF: Certainly on the issue of cognitive impairment, it is an amendment to the Act which comes from an actual set of cases that have happened in New South Wales. I think it is a matter for evidence and I think, as with any other matter in a discrimination case, it would be bringing and leading expert evidence as to the cognitive impairment of the person who has been complained against.

The Hon. NATASHA MACLAREN-JONES: I suppose the question is this is coming under section 89B, which is before an investigation occurs. Would the onus be to bring forward that evidence to then allow the president to make the decision, or are you saying that the president would need to do a further investigation?

Mr STEENHOF: The president did say that there may be room for a process once a complaint is received where it raises issues that on its face might be material; they can go to the person complained against and ask for an explanation, particularly in cases where you have multiple complaints against an individual. Where the president knows or should know that it involves cognitive impairment, it could be affected to short-circuit further complaints being brought and multiple complaints being brought, even at that initial stage.

The Hon. NATASHA MACLAREN-JONES: Mr Sneddon, in your submission you have actually gone further to put in section O, which is that it is not in the public interest to make the complaint, or I assume that is what it is in regards to. Can you please elaborate on how would that be determined?

Mr SNEDDON: That is a matter for the president to take a view as to that. It is almost a catch-all. Although it is not expressed as a discretion, it effectively is a discretion because the president has to determine whether or not it is in the public interest. I am thinking it may be cases like the cognitive impairment respondent, where someone should not be saying the things that they are saying, but there is probably limited value in terms of public denunciation, deterrence or other purposes to actually pursue that person through a series of complaints to the Anti-Discrimination NSW tribunal or other body. I do not imagine this would happen very often. Again, this would be a matter which could be appealed to the NSW Civil and Administrative Tribunal, but it seems to me a useful catch-all to have there. There might be certain cases where, again, it is the president who has to make that determination. I do not think the president would be making that determination lightly.

Can I just add one thing to your question before about cognitive impairment, which is to say that we have also recommended that all of these grounds on which the president might reject a complaint at the outset can be applied later on, because the president is right: When you get the complaint initially it may be ill-formed and all of the details may not be there. You might need to do some investigations first to work out whether there is substance to it, but after you have done some weeks of investigation, or maybe had a first meeting, you might at that point determine that it is frivolous, vexatious, or the person has a cognitive impairment or any of these other grounds. Exactly the same criteria for terminating a complaint would apply after a complaint has been under investigation for some time as at the outset; that is, you do not just have to make this decision once and for all at the outset. You could investigate and then say, "Well, in light of what we have learned, we think these criteria are now met and the complaint should be terminated."

The Hon. TREVOR KHAN: Mr Sneddon, my name is Trevor Khan. Good morning.

Mr SNEDDON: Good morning.

The Hon. TREVOR KHAN: I congratulate you on the quality of your submissions. I am not being gratuitous when I say they are well researched and I thank you for them. I invite comment from you about the evidence that we received from the president of the Anti-Discrimination Board this morning, which, as I understand, you heard or watched. Is that correct?

Mr SNEDDON: I watched and heard some of it, yes, not all of it.

The Hon. TREVOR KHAN: We will get onto guesswork here. One of the issues that we all came back to on a number of occasions was the suggestion made by the president that we should be considering introducing a provision for striking out the proceedings because of a vexatious complainant. I am interested in your view on that and through what process, if it be one, that you would identify a vexatious complainant.

Mr SNEDDON: Thank you for the question; it is a good one. I did hear the president speak to that issue. I think the Committee needs to have very clearly in its mind two different issues around vexatious complainants. What we have submitted is that the individual complaint be assessed by the president as to whether it is frivolous, vexatious, misleading, lacking in substance et cetera. We strongly support that because it may be that a particular complaint is just one of those things and it can be thrown out and then you do not have to make any finding about the person who is making the complaint. We strongly recommend the complaint being able to be terminated or not accepted on those grounds. It is a separate issue as to whether you should have a vexatious litigant power in the Act. I am not opposed to that. I think that the former is probably the better and quicker way of dealing with it—that is to say, dealing with each complaint as it comes up.

The president is right. Making a finding that someone should be treated as a vexatious complainant is a serious finding. Typically, in vexatious litigation statutes the person is then ordered by the court that they cannot commence proceedings without the leave of the court or tribunal. The president is right about that. It requires a serious amount of evidence. I am not sure that Anti-Discrimination NSW is the right body to be making that. You would probably want to give that to NCAT. I am not opposed to giving that power to NCAT but I think it is a long and difficult way around to solve the problem that you have got at the moment. Apparently, you do have serial complainants in New South Wales so it may be that it is appropriate to put that in place for those types of complainants. I would probably support it. I would need to think about it a bit further, but I think the quicker, the better and the more effective remedy is to have the powers we are suggesting, which is the president gets rid of a complaint if the complaint is vexatious, frivolous et cetera, without needing to make a separate assessment about whether or not the complainant is vexatious.

The Hon. TREVOR KHAN: You might have me there, but it seemed to me that it could not be a decision that the president would make himself or herself.

Mr SNEDDON: I would not think so, no. I think it would be NCAT or a court making that decision.

The Hon. TREVOR KHAN: Let us put aside vexatious and deal with the concept of frivolous. I think it might be referred to in the board's submission. What if, on reviewing the complaint, one found that part of it was frivolous but another part might have substance? What do you see happening with that style of complaint?

Mr SNEDDON: A sensible outcome would be if the complaint can be severed—that is to say, you can leave off one part, the frivolous part, and keep investigating or trying to conciliate the part that may have substance—then do so. I think we are heading in the same direction. If you received a complaint and part of the complaint falls within the vexatious, frivolous, misconceived or lacking in substance part clearly, you say, "I am not going to deal with that part of the complaint but I will continue to investigate the other part of the complaint." If, later on, the other part of the complaint appears to be in that category, you could reject it then. But you should pursue it. It probably depends on the nature of the complaint as to whether everything is interwoven. If it is, for example, a series of statements being made by a person which is complained about, it may be that some of the statements are—the complaint about them is frivolous or insubstantial, and that could be set aside immediately and the more substantive comments made. I would have thought that is just a commonsense way to go.

The Hon. TREVOR KHAN: Indeed. Does that mean that there needs to be a power given to the president or the board to actually sever as the alternative to the strikeout or the dismissal powers that are sought to be given here?

Mr SNEDDON: I think that would be useful, yes, so that you just amend the relevant section to say, "If the complaint or part of the complaint is"—the list of factors—"then that complaint or that part of the complaint may be rejected or terminated."

Mr STEENHOF: If I can just answer that question too, that is already present in section 92 of the Act. It allows the president to act in relation to a complaint or part of a complaint.

The Hon. TREVOR KHAN: I am attracted particularly by submission 22. I am struggling through 22a, I have to say. Let me ask you this in terms of the costs implications: If there is a finding that the proceedings have been vexatious, as I take it your view is that there should be some costs implications if the complainant wishes to take it any further at that point. Do I take it that that, therefore, would mean that any further application that was to be made would not be through NCAT but rather would have to be, for instance, through the Supreme Court to set aside that finding? Is that where it is going?

Mr SNEDDON: I will let Mr Steenhof speak in a moment. No, not necessarily. NCAT is normally a non-costs jurisdiction. I think these sorts of complaints should probably stay out of the Supreme Court because the costs would be prohibitive for them. What I think we are suggesting is in order to disincentivise persons who might enjoy the no-costs jurisdiction freedom to make other people's lives a misery, they should have one free go in Anti-Discrimination NSW. If they are not happy with a decision to terminate, they could appeal that through NCAT. But in NCAT on such an appeal, NCAT should have the power to award costs against the losing party on that appeal.

The Hon. TREVOR KHAN: Who would be the parties to those proceedings?

The CHAIR: The time has expired. Thank you very much for an excellent line of questioning and even better answers.

The Hon. MARK LATHAM: Thank you to Mr Sneddon and Mr Steenhof for the quality of their submissions to the inquiry. Just to come to the case studies that are presented, can I get clarity about this case of the mother of four and small businesswoman in Brisbane who signed a petition on Facebook about certain people reading out books in a Brisbane municipal library. It was a concern that adult entertainers had some association with drugs and prostitution. Homosexuals and homosexuality were not mentioned. Then it goes on to say that four months later the mother of four received an email from the Anti-Discrimination Board NSW saying they had written to the client about the complaint and threatened certain things, that the board had the power to compel a Queensland resident to provide information. Has this matter now been formally regarded as investigated by the New South Wales board? What happened after the April 2020 letter, please?

Mr STEENHOF: After the April 2020 letter the board has responded and has given us correspondence that suggests that they are compelled to push the matter on to investigation and then asked for our client to give a full response to the allegations. They had relied on an address provided by the complainant, so it did not reach our client because it was the wrong address. So the first correspondence she received was that email. They subsequently advised that the process from here is that they will ask for submissions from our client and that those will go back to the complainant, and then the president will determine whether or not the matter is conciliated or sent off to the tribunal. What is not contained in the letter is anything about the powers of the board at any stage of the investigation to decline the complaint.

We have just sent correspondence yesterday with about eight or nine grounds on which we say this complaint should be declined right now before advancing any further down the process because this is clearly a worthless complaint and it fails on a number of grounds; not least, it simply does not meet the statutory test for homosexual vilification, let alone that this is a Queensland woman who was posting on a Queensland issue completely unrelated to the complainant. Our concern is that in all of the correspondence that we have been receiving from the board, there has been no attempt to assist our client, who is just an everyday Queensland businesswoman, to direct her submissions to the actual fact that this is probably a worthless claim. Instead it says, "You need to answer these questions and you need to be drawn into this conciliation process." It is costly and it is time consuming. Our client also does not want to receive any more unsolicited correspondence from the complainant, which has been quite nasty leading up to this.

The Hon. MARK LATHAM: Is that doxxing and email harassment ongoing?

Mr STEENHOF: There have not been any emails received since the original email.

The Hon. MARK LATHAM: Has a complaint been lodged in the Queensland jurisdiction about the Queensland woman?

Mr STEENHOF: There is no complaint in the Queensland jurisdiction.

The Hon. MARK LATHAM: If I can go to your third case study, one of the points made earlier by the president, Dr Bennett, was that with regard to cognitive impairment, how would the board ever know of that circumstance. But you have given a case study here of more than 20 complaints lodged against an individual who had a car accident, and I think it is public knowledge that there is an element of cognitive impairment at play. The individual makes random posts on Facebook and elsewhere that are of no consequence to anyone other than the vexatious complainant, who has pursued him 20 times. What would be your expectation, Mr Steenhof, as to the point when the Anti-Discrimination Board of NSW knew that the respondent had this car accident and had this cognitive impairment, given that he has been through this process 20 times now?

Mr STEENHOF: I cannot directly comment on that because I am not aware of the full history of the complaint. I have merely gone on what are publicly available documents. But the real tragedy of these cases is that the case law that has been manufactured and made from these decisions is widely quoted by academics and yet has been made with someone who has been poorly represented or even had to represent himself. It is just a blot on the New South Wales law book that these cases have gone forward to tribunal decisions and that someone who is mentally impaired has been the subject of contempt of court proceedings and the non-payment of fines when, really, these should have been terminated at a very early instance.

The Hon. MARK LATHAM: After the first complaint they must have known the circumstance, but they have accepted another 19.

Mr STEENHOF: I could not comment. I would hope that there was significant awareness of those issues early on.

Ms ABIGAIL BOYD: Thank you both for your attendance today and for your detailed submissions. I want to drill down into the numbers of vexatious complainants. When I asked the president, I was told that around 12 per cent of complaints get declined. We did not have the statistics available as to how many of those were declined for being vexatious. Do you have any idea of what percentage actually get declined as vexatious, as opposed to not made out for some other reason?

Mr STEENHOF: We are not able to give that information. We can only go on the information we get from clients who come to us for assistance. We are a very small organisation that has only just started and we are already starting to deal with these complaints. But it seems apparent that one of the problems in drilling down into the information about these complaints is the confidentiality provisions in the Anti-Discrimination Act, which should really be amended so that there is more transparency of justice in this regard, because the statistics that were quoted seem to me to be largely unhelpful in really determining whether or not vexatious complaints and multiple complaints are going through the board to the tribunal.

Ms ABIGAIL BOYD: Is it your assertion that some of these complaints that you view as being vexatious make it to a point where they are actually successful? Are we getting vexatious complaints making it all the way through and being successful, or are they being declined?

Mr STEENHOF: The complaints that we have dealt with are currently in the system. Many times the process is the punishment. We do not have information or any sort of transparency about which complaints make it to a point much further than they should have. All we know is that the complaints handling procedure right now can easily be tightened up to lift it to the level of other States and at a Federal level.

Ms ABIGAIL BOYD: What I am wondering is how many of the complaints that you would view as vexatious might be viewed by other people as credible but there is a different viewpoint. Subjectively, if a complaint that you do not think is worthy of being successful does not get declined, is it then necessarily vexatious? At what point is the difference between, for example, the example you gave about that particular post—I find that post quite shocking so I understand there are going to be different views on what we count as being a valid claim or a valid complaint. When you are talking about vexatious complaints, do you mean ones that you do not personally agree with or ones that have been found out at a later stage of the process to be, in fact, vexatious?

Mr STEENHOF: No, not at all does it come down to my personal views on these things. It is about an application of the legal principles as they exist to the handling of those complaints and ensuring that those are set up in such a way that they do not provide a terribly low bar for complaints to go through. I would hope that the member would see that it is outside the purview of the Anti-Discrimination Board to be chasing Queensland residents who have made a post read by three or four people where the person is not directly affected by the post or where they do not refer to homosexuality. I would hope the member would be shocked by the fact that this person has been put through—

Ms ABIGAIL BOYD: Again, we have different views, but I am not shocked. We are talking about jurisdiction there and I think there are a few different issues going on. What I am trying to get at is, at the moment, we have a discretion for the president to decline matters that are viewed as being vexatious. If what is viewed as vexatious is subjective anyway, even if you put an obligation on the president to decline those vexatious complaints it would be in the purview of the president to determine what is, in fact, vexatious. Would we end up with a different set of complaints going through the process? Perhaps I could ask Mr Sneddon.

Mr SNEDDON: I can answer that, member. The president does not currently have a discretion to reject a complaint on the basis that it is vexatious or frivolous, and I think she said that herself. She can reject a complaint on the basis that no part of the conduct complained of could amount to a contravention of a provision of the Act or the regulations, but she does not have discretion to reject a complaint on the grounds of it being frivolous or vexatious, which the Australian Human Rights Commission and most other anti-discrimination complaints do. The proposal is to put in a provision. You can either decide that it is discretionary or you can decide that she must reject if she is satisfied, which is what the Liberal and Labor members did with the Australian Human Rights Commission Act. But it should be put in there that the president has the capacity to terminate or, later on, reject a complaint if it is frivolous, vexatious, misconceived or lacking in substance. That is not there at the moment. That is why a legislative change is required.

Ms ABIGAIL BOYD: When we heard from the president, she was saying it would be useful to have that at lodgement stage and that it is missing at lodgement stage. Are you saying there is no provision at all at any point in the process at the moment?

Mr SNEDDON: I am sorry, I was looking at 89. I would have to go and look at the later on investigation and conciliation. I did not think there was but I have to take that on notice. I am sorry. I am not sure.

Mr STEENHOF: I can confirm that that is present at investigation stage. The president at any stage of an investigation can terminate if the claim is frivolous, vexatious, misconceived or lacking in substance.

The CHAIR: At this point we have to call questioning to an end. We have gone a little over time. I note that you have taken a question on notice. Perhaps you could respond. The secretariat will be in contact with you within 21 days. Thank you for coming.

Mr SNEDDON: Chair, I think Mr Steenhof may have answered the question.

The CHAIR: I think you are absolutely probably right. Thank you.

(Short adjournment)

AUDREY MARSH, Co-Convenor, NSW Gay and Lesbian Rights Lobby, before the Committee via videoconference, affirmed and examined

The CHAIR: Thank you for coming, Ms Marsh. Would you like to make a short opening statement? If you do, please keep it to no more than a couple of minutes.

Ms MARSH: Yes, thanks, Chair. Thank you all for the opportunity to address the inquiry about our concerns regarding the Anti-Discrimination Amendment (Complaint Handling) Bill 2020. By way of an introduction, the Gay and Lesbian Rights Lobby started in 1988 and we are the peak organisation for gay and lesbian rights here in New South Wales. We also join advocacy efforts with our partners and allies across the LGBTIQ community and we are proud to have worked with members of Parliament from across the political spectrum in achieving rights for our community. To begin, we would urge the inquiry to recommend the rejection of the bill. We have two key concerns with the bill as currently drafted. Firstly, we are speaking as a group that advocates for users. We do not come with a particularly strong legal perspective, but we come as advocates for people who use the system to access justice. We worry that complaints to the Anti-Discrimination Board are often made by unrepresented complainants. The bill places significant hurdles in their access to justice. Secondly, we think a piecemeal approach to law reform in the area of anti-discrimination is not a method that will best serve any users and anyone who relies on the system.

To return to my first point, the bill as currently drafted places significant hurdles in front of people who are attempting to access justice by making a complaint to the Anti-Discrimination Board. We will let our colleagues in the legal advocacy space speak more to the statutory implications, but we do think it is clear that there are two key concerns for our community from the way the bill is currently drafted. Firstly, by replacing the word "may" with "must" in section 89B, the bill removes the discretion of the president and requires the rejection of any complaint that occurred more than 12 months prior to the complaint being made. By further adding additional criteria that requires rejection, crucially, at this initial stage—at the time of lodgement—this once discretionary power to deny a complaint at this time has been expanded to mean that a president must deny a complaint that seems, on the mere face of it, to lack substance and to prevent it from proceeding to any investigation phase. In regards to our second point, while we note that this inquiry is not discussing individual cases, we understand that this bill responds to the issue of vexatiousness.

It is our belief that all legal bodies capable of hearing complaints have the possibility of receiving vexatious matters. It is just the nature of a legal system that affords access to justice and access to legal representatives to the entire community. But we do not believe that wholesale reform of the system as a response to individual issues is a sensible approach to law reform. Additionally, as the Law Society of NSW point out, the Act has existing mechanisms to consider vexatiousness at an appropriate stage. Like so many stakeholders, we would like to see a full review of the Anti-Discrimination Act. We are under no illusions that it is perfect. It is an old piece of legislation and there are many things we would like to see changed to better serve the interests of our community. But a piecemeal approach to reform cannot be a substitute for a full and thorough review of the operation of the Act. A future review could consider issues of complaint management, but it should be done so in consultation with the entire community, not in response to the individual concerns of just a few in response to one particular matter. Chair, I will leave my opening statement there and I am open to questions.

The Hon. ROSE JACKSON: Thank you, Ms Marsh, for coming along. I want to ask about some of the access to justice issues that you mentioned. I understand you are not a law reform group and not a legal advocacy group. In terms of the representation that you provide to gay and lesbian members of the community, perhaps take us through in a little bit more detail what some of the barriers are that vulnerable people might face in making a complaint—that is, the people you represent who might be subject to discrimination. What are some of the pre-existing issues they may face in bringing a complaint forward in the first place?

Ms MARSH: Thank you, Ms Jackson, for the question. We are concerned about two or three particular types of discrimination that the Anti-Discrimination Board looks at. We are using slightly out-of-date language now because, as I said, the Act does need a bit of an update. We are interested predominantly in discrimination on grounds of homosexuality, of gender identity—so we are talking about the transgender community—and also infectious diseases; that has a very strong overlap with people who are HIV-positive. To illustrate the impact of these new provisions, I have a case study I would love to bring. It is a real case study from the Anti-Discrimination Board. It is a case that was dealt with in October 2016.

The complainant in this matter worked as a labourer in a car yard. He had alleged that he had been subject to discrimination because he was gay on numerous occasions by a particular salesperson at his workplace. This included making jokes about his homosexuality and introducing discussions about his sexuality into conversations at an office Christmas party, and this person told his co-workers that he wanted the poofter gone. The complainant

also said that when he complained about this conduct to the company's chief financial officer, the financial controller said the complainant could take the matter further if he wished, but that management would not be assisting because homosexuality was against his religion.

In that case study you see quite a lot of elements of what people are facing when they make a decision to come forward. There you have a man who has been singled out in a workplace, a place that he obviously needs to attend because it is a place that he gets financial gain from; it is where he derives an income. He has been singled out. He has been left entirely unsupported by management as a result of their own religious beliefs. There is the use of derogatory language in that complaint. So you are dealing with someone who is likely really embarrassed that this has happened to him at work and someone who feels entirely unsupported by management. There are a lot of systemic barriers to people in the LGBTIQ community accessing justice because there is well documented ridicule.

If we extrapolate on this point further, let us imagine that the bill that is currently proposed was in place and this man who had been, I think we can all agree, subject to harassment and discrimination did not lodge a complaint for 12 months because he needed to keep on making money and deriving an income. It has been made clear that if he did make a complaint, he would not have the support of his management. There we have the ticking off of that idea that you cannot lodge a complaint or that a complaint would be automatically declined because of a reasonable length of time. Additionally, let us assume that this complainant decided to go unrepresented. Perhaps English was not his first language or perhaps he just did not have the technical skills to write a complaint that really portrayed what had happened to him. So there, just on the face of it, it appeared to lack substance because of the way this unrepresented man had drafted the complaint.

In both of those instances if this bill continued, that complaint—prior to any investigation—would have to be declined. There would be no discretion on the part of the president to receive a complaint of obvious discrimination because a period of time had elapsed. Twelve months is not a long time. There are a variety of reasons a person might not make a complaint within those first 12 months. We are talking about a system that almost encourages unrepresented applicants. When you go onto the Anti-Discrimination Board's website, they talk you through how to make a complaint and make it very clear you do not need a legal representative to assist you. To automatically stop a homosexual man who has been subject to clear discrimination from accessing justice because of the elapsing of a period of time and an inability to write a complaint that adequately showed what had happened to him—it is a very perverse outcome. That man should have been able to access justice and under this system it appears he would not.

The Hon. SHAOQUETT MOSELMANE: Thank you very much, Ms Marsh, for coming today. I appreciate your submission. You have [inaudible] two areas that you [inaudible] in the bill about discretion and the ability [inaudible] and the vexatiousness. But you did not address the issue of jurisdictional [inaudible] which other organisations [inaudible] really are concerned about the issue of jurisdiction. For example, a number of complaints have come from Queensland but are dealt with in New South Wales. What is your response to that?

Ms MARSH: You were cutting out a little bit there, but I think I got the essence of the question, which is commenting on this issue of people bringing matters from interstate.

The Hon. SHAOQUETT MOSELMANE: Yes.

Ms MARSH: I am not going to make any comment on individual cases; I understand that is not in the terms of reference of this inquiry. But, more broadly, I think that it is unclear, as a layperson—it could very reasonably be unclear, as a layperson attempting to access justice through the Anti-Discrimination Board, which is the most correct means to do so. The internet occurs across jurisdictions. People can discriminate and harass across more than one State and Territory border. That is obviously clear. I do not think we should punish complainants who, in error—and the way the bill reads to me is that this could actually exclude people who, in error, lodge complaints in, perhaps, an incorrect jurisdiction because they are unclear. If you are a person living in New South Wales and you are subject to discrimination from someone who lives in a different jurisdiction, I think that it is very fair that a layperson may not be totally clear on where to seek justice. Punishing unrepresented victims of discrimination in this way, I think, is not a good outcome.

The Hon. SHAOQUETT MOSELMANE: But if it is clear that the applicant or complainant and the respondent are both in Queensland, why allow it to be dealt with in New South Wales?

Ms MARSH: I agree that the president should retain, crucially, the discretion to make judgements about jurisdiction. That seems to me like a question that the president probably should. I watched earlier witnesses today. The president is correct in saying that, crucially, what is important in her role is maintaining discretion. While in some instances it is probably true that the Anti-Discrimination Board of NSW is not the body to hear that complaint, by changing the legislation in this way I think it just has this wide-reaching effect well beyond those

particular cases to see an impact on people who make mistakes surely out of error. I guess the substance of our concern is the changing of that word from "may" to "must". The president should have discretion to decline complaints as they see fit, and we do not propose any significant problems with the way the legislation currently operates in the discretion offered to the president. What we do have an issue with is that by raising this threshold so high that anything must be declined, I think it is just very likely that people who make genuine mistakes in seeking justice will be caught up in that and legitimate cases of discrimination will be not heard because of the way this legislation will likely operate.

The Hon. TREVOR KHAN: Ms Marsh, it is Trevor Khan here. How are you?

Ms MARSH: Good thanks, Mr Khan.

The Hon. TREVOR KHAN: We have spoken before, just so everyone knows.

Ms MARSH: We have.

The Hon. TREVOR KHAN: There are a variety of subsections under 89B that deal with matters that the president could take into account in deciding whether a complaint goes forward. You have rightly referred to, for instance, the 12-month rule; I certainly can see circumstances that arise there. But if we added a provision that said a vexatious complaint is also grounds for dismissal, does that necessarily fall into the same category of concern for you as simply what we could describe as an innocent complainant who, for whatever reason, has not lodged the complaint within 12 months?

Ms MARSH: I think it does insofar as the way we understand the operation of the legislation is that what we are dealing with in 89B is the first moment, essentially, a complaint lands on the desk of a president. So questions of vexatiousness appear to be dealt with adequately in the investigations phase. But to make an automatic decision about vexatiousness just on the pure face of what is placed in front of you, we are not saying that vexatious complaints should be able to proceed. We are absolutely in favour of the existing system that stops vexatious complaints from proceeding. I think it is under section 92.

The Hon. TREVOR KHAN: Correct.

Ms MARSH: But making a decision about vexatiousness at the absolute first instance with very little or, in fact, no investigation on the part of the president seems to me like there could be times when, for whatever reason, a complaint from an innocent party could appear vexatious. I have not used the system myself but we have spoken to people who have. There is a possibility that it may seem vexatious on the mere face of it but, upon investigation, there is substance; it is not actually vexatious. We are not in favour of removing the ability to throw out vexatious claims, of course, but we are against placing that decision right at the beginning when there is a system that appears to work.

The Hon. TREVOR KHAN: Suppose that somebody lodges a complaint that does not amount to a contravention of a provision of the Act. We have obviously got the heads currently in the bill. But let us suppose that somebody lodges a complaint today that says, "My employer"—who just so happens to be gay—"has discriminated against me because of my religious beliefs." It is not a head that exists in the Act and therefore the complaint, in that sense, cannot succeed.

Ms MARSH: Yes.

The Hon. TREVOR KHAN: Should that complaint be capable of going forward?

Ms MARSH: Mr Khan, this probably returns to our broader point, which is that we are under no illusion that the Anti-Discrimination Act of New South Wales is operating perfectly. We personally have a variety of things we would like to see changed. I am sure a lot of the members of the inquiry would be aware of some of the things we would like to see changed in the Act.

The Hon. TREVOR KHAN: I am, yes.

Ms MARSH: Yes, I assumed you would be. I guess the substance is that is a very valid question that requires genuine interrogation. We would like to see changes to the heads of discrimination that are possible, and we know that some bodies ask for religion or lack of religion to be included as one of those. That would form a wonderful part of a proper, thorough review of the Act in its entirety. I do not have the skills or the legal nous to make a decision about whether I think that claim should proceed. But there are certainly bodies in New South Wales who could work with an external agency like the law reform commission to form a very valid position on that, which is why we are asking that this bill does not proceed but that what does go ahead—what we would love to see in New South Wales—is a review of the Act in its entirety. Complaints management should absolutely form part of that. I am sure there are many tweaks and changes that the system could accommodate that would see a

vast improvement in its operation. Perhaps the case you raised is something that could be considered, but we do not think this bill is the way to do it. I guess that returns to that point for us.

The Hon. TREVOR KHAN: What I am interested in in this bill and any other bill like this is to take it, in a sense, on its face, but also to take into account that whilst we deal with the current heads of discrimination, what I would invite all participants who are coming forward to consider is what is it going to be like if religious discrimination is added to this bill so that members of the LGBTI community could well find themselves being respondents, not complainants, and how would it impact on them if, in fact, a complainant in the circumstance of religious discrimination is making a frivolous or vexatious claim, for instance, or one that apparently lacks any great substance. That is an observation I make. My final question is this: Going back a little bit in history during the marriage equality debate, there was a letter sent out in Tasmania by Bishop Porteous which caused a considerable amount of uproar at the time, particularly when a complaint was lodged in Tasmania. What would you say if somebody in New South Wales had commenced proceedings against Bishop Porteous in New South Wales for the letter that he distributed in schools in Tasmania? Would you see that as a valid exercise of jurisdiction in New South Wales?

Ms MARSH: I do not have a particular legal opinion on that, Mr Khan. I think the position that we firmly hold is that there are, I am sure, numerous cases where the discretion of the president should be exercised to stop a case from proceeding. But, again, the word there is the discretion of the president. The system, as we have said, is by no means perfect and we would welcome any review into the Act in its entirety. What we are not comfortable with in this bill is removing the discretion of the president. I am not a lawyer. I do not have a particular position about the legality of bringing cases in different jurisdictions. What I do have a position on is making sure that legislation is not drafted in such a way that it has such a broad, sweeping scope so as to sweep up into it the genuine complaints that people may bring. The Anti-Discrimination Board deals with and brings justice for homosexual, transgender and HIV-positive people all the time. A change to the legislation in response to this particular issue by entirely removing the discretion of the president is just not a good outcome for that.

The Hon. MARK LATHAM: Thanks, Audrey, for the submission and also your evidence today. If I could just point out one aspect: Would you concede that in the way the bill is drafted, the president still maintains discretion on the question of frivolous, vexatious and misconceived complaints? It clearly says in schedule 1, part 4 (f), "the President is of the opinion that the complaint". Do you recognise that this is not a mandatory thing? If the president is of a certain opinion, that is obviously the president's discretion with regard to ruling out frivolous, vexatious or misconceived complaints?

Ms MARSH: I concede that the phrase "of the opinion" is in there. I think the problem we have is not so much with the way that that provision has been drafted, but the phase in which it is brought in. By requiring the president to make a judgement on substance, frivolity and vexatiousness the moment it lands on their desk without having the opportunity for any investigation into the nature of the complaint, I do think it essentially removes—it does not remove discretion, but it is an inappropriately timed judgement on the part of the president. The president should be able to make that decision and make that judgement for themselves. I think it is well served by section 92. Bringing it forward to that investigation phase—it does not seem like it would be operationally ideal for either party to have that matter decided when there had been, essentially, no investigation.

The Hon. MARK LATHAM: Then why do you think that every other State in Australia has a law requiring a judgement about vexatious, frivolous or misconceived the moment the complaint is lodged? It seems to me that what the other States are trying to say and what we are trying to achieve in New South Wales is that if these bodies with scarce resources do not have to deal with matters that are clearly vexatious and frivolous upfront, they can then concentrate their resources on the more substantial complaints, such as legitimate complaints of discrimination against gay people in the workplace.

Ms MARSH: Mr Latham, I am not familiar with the legislation in other States and I am not able to pass comment on that. I would refer to the point the president made in her evidence this morning. It was very sound in regards to the discretion to make a decision about a vexatious complainant. We have seen that other jurisdictions like the Supreme Court, I believe, maintained a list of vexatious complainants. To us, that seems like something that could work. That is probably something for the inquiry to consider and the president was very sound in her point there. I am sorry, Mr Latham, I cannot necessarily provide any substantial reflection on how it compares to other jurisdictions, only that we are concerned it would not operate in the interests of our members here in New South Wales.

The Hon. MARK LATHAM: What I am intending with the bill is that we bring New South Wales into line with what other States do. Just on this question of 12 months which you have made earlier, would you concede that Parliament's intention for the 43 years of the legislation has been to deal with complaints of less than 12 months' standing? If the president has discretion, using the word "may" at the beginning of section 89B (2), to

basically ignore all the sections there—they are very limited at the moment; one of them is the 12 months rule—that the role and opinion of the Parliament becomes totally redundant. I have found out for the first time the president is using discretion to accept complaints of longer than 12 months' standing. I found that quite a surprise. If the president has so much discretion they may or may not do whatever they like, then the opinion of the Parliament set out in the statute is basically worthless.

Ms MARSH: Mr Latham, I am not sure I agree with you that the intent of the legislation as currently drafted is to exclude all complaints that occurred more than 12 months prior to the complaint being lodged. I think there is the ability for the president to use their discretion to use that as a grounds of denial. I think the problem we see here is there are numerous valid reasons a person may wait for 12 months. I think in the case that I explored before, that person relied on their work at a car yard for the income, so making a decision not to lodge until after their employment had ceased seems a very reasonable decision on the part of the complainant. I think 12 months is not a long time and there are instances, when you look at the case studies, of very, very long-term, systemic homophobic bullying that occurs in workplaces, especially, that could occur over a period of more than 12 months. A year is not a long time in a period of employment. I think removing the discretion would be a perverse outcome for people who may have reasonable delays in lodgement.

The Hon. MARK LATHAM: Would you rather remove the 12-month rule? Do you think it should be an unlimited time period for lodgement of complaints?

Ms MARSH: I do not really have an opinion on that, Mr Latham. What I would like to see is the president retaining discretion about delays. I think 12 months, to me, is neither here nor there. No time period, to me, is also neither here nor there. I think you would not want to see a situation where someone could bring a complaint that occurred more than 40 years ago. I agree with you that would not be a good outcome. But requiring a firm, immovable deadline of 12 months is not a good outcome, in my mind.

The CHAIR: We now revert to—

The Hon. MARK LATHAM: Finally, could I ask about your assessment of the very high-profile Folau case—

Ms ABIGAIL BOYD: Point of order: I believe your time is up, Mr Latham.

The Hon. MARK LATHAM: Sorry, I did not hear that. Are you chairing the meeting now?

Ms ABIGAIL BOYD: What was that?

The CHAIR: Order!

Ms ABIGAIL BOYD: Thank you, Ms Marsh, for coming along. Just picking up on that point in relation to the 12-month restriction, there are a number of ways that you can do this in legislation. It is not uncommon to have a 12-month rule as a norm and then to have a discretion to allow it in certain circumstances. Have you seen that 12-month limitation act as a bit of an incentive for people to get their complaint in by a certain time?

Ms MARSH: Thanks for your question, Ms Boyd. We have not seen that as acting as an incentive. I have not seen or heard evidence either way from our members that that had an impact on them one way or the other. Sorry, I am not sure I can find much more information than that.

Ms ABIGAIL BOYD: You mentioned the situation where somebody was still employed by the person that they wanted to complain against as being a reason why they might not have complained within the 12 months. Are you aware of any other types of circumstances that are common, for example, emotional—having to sift through experience before people go to make a complaint? Does that happen very often?

Ms MARSH: In terms of the delay, I could probably theorise about reasons that occur. I am not sure I have a sound answer for you, Ms Boyd. I am really sorry. There are a variety of reasons. There is obviously a process of dealing with the trauma of long-term discrimination. We know that managing that trauma could mean that there is not an ability to make an instant complaint because it might take time to build confidence and to get the assistance you might need. Especially for members of the community who have complex gender identities, there is limited legal assistance and there is a really residual sense of privacy for that community. They are likely reticent to speak up. We see that all the time in the transgender and gender diverse community that there is a reticence to speak up.

So requiring people who may have been the subject of really embarrassing discrimination that they perceive as shameful to act quickly in a 12-month period is an unfair outcome. It is really hard to quantify the complexities of trauma and embarrassment. Shame about complex sexual and gender-diverse experiences is really hard to speak about in a quantified way, especially as we do not get a lot of data about our community. We are not included in the census and other things, so a lot of those impacts are not so well understood for people in our

community. But I think that you make a really valid point about needing to go through a period of emotional processing before you are brave enough to speak out about what has happened to you.

Ms ABIGAIL BOYD: Are you aware of any complaints in the LGBTIQ community that have been called vexatious by the people that they are complaining against as a substitute for saying, "I disagree with you. I disagree with your complaint"?

Ms MARSH: I do not have particular evidence about that in front of me, Ms Boyd. I am really sorry. I do not have specific cases from our members where that has come into question.

Ms ABIGAIL BOYD: Thank you. That is all I had.

The CHAIR: That finalises questioning for today. Thank you very much, Ms Marsh, for coming.

Ms MARSH: Thank you.

(The witness withdrew.)

The Committee adjourned at 12:46.