REPORT ON PROCEEDINGS BEFORE

PORTFOLIO COMMITTEE NO. 5 - LEGAL AFFAIRS

ANTI-DISCRIMINATION AMENDMENT (COMPLAINT HANDLING) BILL 2020

CORRECTED

Virtual hearing via videoconference on Thursday 11 June 2020

The Committee met at 10:15.

PRESENT

The Hon. Robert Borsak (Chair)

The Hon. Rose Jackson
The Hon Trevor Khan
The Hon. Mark Latham
The Hon. Natasha Maclaren-Jones
The Hon. Shaoquett Moselmane
Mr David Shoebridge (Deputy Chair)
The Hon. Natalie Ward

The CHAIR: Welcome to the second 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 would also like to pay respect to the Elders past and present of the Eora nation and extend that respect to other Aboriginal people present. Today is the second hearing in this inquiry. We will hear today from the Intellectual Disability Rights Service, the Public Interest Advocacy Centre, the NSW Council for Civil Liberties, the Australian Christian Lobby, Freedom for Faith, the Anglican Church Diocese of Sydney, the Law Society of NSW, Kingsford Legal Centre and the Australian Discrimination Law Experts Group.

First and foremost, I would like to make some brief comments about the procedures for today's hearing. Like so many other things we have needed to adapt to in the face of 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 being new territory for the upper House inquiries, I would 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 by using the same link as provided by the Committee secretariat.

Today's hearing is being webcast live by 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 only answer if they had more time or with certain documents to hand. In these circumstances, witnesses are advised that they can take a question on notice and provide any answer within 21 days. I remind everyone here today that the 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 terms of reference and avoid naming individuals unnecessarily. Finally, could everyone mute their microphones when they are not speaking, to minimise any background noise.

TIM CHATE, Solicitor, Intellectual Disability Rights Service Inc., sworn and examined

JONATHON HUNYOR, Chief Executive Officer, Public Interest Advocacy Centre, sworn and examined

ALASTAIR LAWRIE, Senior Policy Officer, Public Interest Advocacy Centre, affirmed and examined

STEPHEN BLANKS, Treasurer, Executive Committee, NSW Council for Civil Liberties, affirmed and examined

ANGELA CATALLO, Committee Member, NSW Council for Civil Liberties, and Convenor, Asylum Seekers and Refugees Action Group, sworn and examined

The CHAIR: Would you like to start by making a short opening statement, and could you keep it very short—no more than a minute or two—because we have got a lot of witnesses and we do not have a lot of time. Ms Catallo, do you want to start?

Ms CATALLO: Mr Blanks will be providing our opening statement.

Mr BLANKS: I will be very brief. As we say in our submission, the proposed amendments to the Act are both unnecessary and inappropriate. Removing discretion and imposing duties on an official are simply an opportunity for further litigation if somebody disagrees with the application of the Act in a particular case. These amendments, to the extent that they are designed to remove discretion of the president, are misconceived and will be counterproductive. The purpose of the board is to provide a relatively informal process for resolving grievances. The appointment of high-calibre presidents, such as retired judges, provides a system where people can be reasonably assured that discretions are going to exercised wisely.

Mr LAWRIE: Mr Hunyor will be giving our opening statement.

Mr HUNYOR: Thank you for the opportunity to appear before the Committee today. As we have indicated in our submission, we do not support the passage of the bill, not because we think the Anti-Discrimination Act [ADA] is a perfect law—we think that it is outdated and in need of modernisation and, indeed, we are working with a range of groups on a project to make a case for comprehensive reform to make sure that we do have an Act that meets the contemporary needs of our community—but the measures in the bill would, in our view, make the Act and, therefore, the protection of human rights in New South Wales, worse rather than better. We recognise that the intent of the bill is to prevent vexatious complaints, but its impact would be to exclude legitimate complaints of discrimination first by the president and subsequently by the NSW Civil and Administrative Tribunal, NCAT. So it would seriously undermine the effectiveness of the Act.

A significant problem with the bill stems from the removal of the president's discretion to accept or decline complaints, replacing "may" with "must" in 89B. We are not aware of evidence the president has failed to properly her discretion to decline complaints under this section and it is necessarily a power that should be used sparingly because it bars a person from proceeding with their claim. So it has significant implications for access to justice in the context of beneficial legislation that is seeking to protect the rights of people who experience disadvantage. The problem created by the bill is then compounded in a number of ways. The bill compels the president to decline complaints prior to investigation on a number of new grounds; it inserts new grounds compelling the president to decline complaints during investigation; and it significantly limits access to NCAT by removing the ability for complainants to require a referral of their complaint by the president. Each of these major changes could see valid complaints rejected before they have been properly considered.

If I can just give one example, before I finish my opening remarks, on the way in which this bill would operate unjustly. The effect of the bill would be to require the president to decline a complaint if the whole or part of the complaint occurred more than 12 months before the making of a complaint. So this would apply to a person complaining of a course of conduct which may have taken place over many years and it would require all those parts of the complaint more than 12 months before the complaint was made to be excluded. So if you consider a woman who has been subject to years of ongoing sexual harassment by an employer, but has been fearful of making a complaint because they cannot afford to lose their job, when that person is finally in a position to bring a complaint or the situation is so unbearable that she feels she has no choice, the president would be required to decline those parts of the complaint that occurred more than 12 months earlier, even though it is a course of conduct, and there would be no discretion to take into account the particular circumstances that flow from the very abuse of power that underlies a discrimination.

That is the sort of clearly unjust outcome that could flow from this. So we cannot support these changes. We do believe that adequate safeguards exist by allowing the president to exercise a discretion and requiring

NCAT to grant leave to hear complaints that have been terminated at an early stage. We think they are appropriate. So the bill therefore, we believe, should not pass.

Mr CHATE: I am a solicitor with the Intellectual Disability Rights Service and also the Ability Rights Centre, which is the community legal centre part of that service. Our client group is people with intellectual disability and cognitive disability. Our submissions to the portfolio committee were sent in mid April. Our position is, with respect, that the Act should not be amended as proposed. I agree very strongly with the words that the previous two speakers have said. Many of our clients lack legal capacity and have difficulty in articulating their complaints; they also face greater evidential problems than the average person. Therefore, we are very concerned that the proposed changes would greatly increase the risk of our clients' complaints being declined by the Anti-Discrimination Board [ADB], with the result that they will be denied their rights to a full hearing of all the circumstances of their case. Thank you.

The CHAIR: We have lost you all.

Mr DAVID SHOEBRIDGE: We can hear you now, Chair. You were not there for a while.

The CHAIR: I think the difficulty is at our end. Thank you, Mr Chate. We might get started with some questioning. We have got IT coming but let us get going.

The Hon. SHAOQUETT MOSELMANE: Mr Chate, particularly about your express concerns, I note that you state that it is desirable for the Act to be interpreted broadly to ensure that matters of complaints are accepted, settled or heard by the board, that you are against raising the bar and also that the issues of cognitive impairment should not be the background in which a complaint must be declined. Can you elaborate on your concerns? I know you expressed it in your opening remarks, but if that goes in, where the president must decline, what impact would that have on your client group?

Mr CHATE: We think a large impact. Many of our clients do not get to the Anti-Discrimination Board. One reason is because we are able to give them legal advice and help them by letters beforehand, but we also have clients that are in disability support accommodation and they have no family, they cannot make the application themselves and they need advocates or other people to make the application. So their ability to make the application—some of the forms that we see get sent in do not give very much detail of their claims and our fear is that if the amendments go through, really they are in the position of having the risk of their claims being dismissed by the president under the amendments and it would create a burden on them really to actually consult a lawyer to make sure that their claims were quite comprehensive, to reduce that risk.

The Hon. SHAOQUETT MOSELMANE: Do you have statistics that you may be able to provide us as to how many cases you deal with a year and how long they take to resolve, that go through with the Anti-Discrimination Board?

Mr CHATE: We probably do around 20 cases a year. The ones that go to the Anti-Discrimination Board are probably between five and 10 and at the moment we have only got one case that is in NCAT.[1]

The Hon. SHAOQUETT MOSELMANE: I will move quickly on to the Public Interest Advocacy Centre [PIAC] with Mr Hunyor. Given your extensive involvement with the Anti-Discrimination Board and your work with the Anti-Discrimination Act, can you see any part of the proposed bill worthy of consideration and inclusion in the existing Act?

Mr HUNYOR: I would defer to the Anti-Discrimination Board as to whether or not there are procedural changes that would help them do their job better. I guess the concern we have got is that it is not clear to us that the current provisions are being not properly applied by the president, so we are not sure that there is really a case

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[1] In correspondence to the committee dated 29 June 2020 Mr Tim Chate clarified the paragraph by inserting: *I think my answer was misleading, and apologise. I did not have any statistics, and should have made that clear to the Committee. My answer was given as an estimate that I made at that time. I ask to now inform the Committee that IDRS gives legal advice to people with cognitive disability, (plus their parents, carers, paid carers, and /or advocates), in relation to many legal problems. Discrimination is one such legal problem. In the course of a year I estimate that IDRS would have about 100 people with cognitive disability, who have legal problems that include discrimination. Of these, I estimate that IDRS helps in some way to resolve between 10 -20 cases by informal negotiations. These negotiations take around 3 months. I also estimate that IDRS helps in some way with between 5-10 cases that have applied to the Anti-Discrimination Board. The mediations take around 3-6 months after the application is made. At the moment IDRS has only one discrimination case at NCAT.*

made for changes. So if there are procedural changes that would assist the president to do her job, then obviously we would defer to her on those things, but the provisions seem to currently allow for vexatious complaints, for example, to be terminated at an early stage in an inquiry and the trouble with the bill is that it casts the net incredibly widely and it takes a discretion and makes it mandatory. So there is sort of a range of compounding problems that arise in the bill.

The Hon. SHAOQUETT MOSELMANE: One of the areas that you deal with is justice for Aboriginal and Torres Strait Islanders in your Indigenous justice project and Indigenous child protection project. How would this bill impact on the work you do with the various Indigenous groups?

Mr HUNYOR: In a similar way to the evidence Mr Chate has given, we represent Aboriginal people who want to make complaints, for example, of racial discrimination. We also deal with lots of people who have disability who want to make complaints of disability discrimination. Those who make it to us already have the benefit of legal assistance; so if people have come to us we are able to assist them to make their complaint. The concern we have is that people who do not make it to us—and we do a very small number of cases relative to the demand that is out there and we know that the other community legal services that we work with in New South Wales are really unable to meet the demand that they have for legal assistance—and for people who cannot get legal assistance, there is the real danger, as Mr Chate has identified, that their cases will be knocked out at a very early stage and they will be then denied the ability to seek a review of that or to take their case up in the tribunal. If, for example, they have simply misstated the position or they have not got their documents in order or those sorts of things, it may mean that their complaint on first blush appears to be lacking in substance. So that is the concern that we have for all of those groups.

The Hon. ROSE JACKSON: I wondered if perhaps Mr Blanks or the Public Interest Advocacy Centre would like to reflect on the importance of discretion in complex areas of law, such as anti-discrimination law. I think that this question of the discretion of the president is one of the key factors that is under consideration as part of this bill and I just wanted your reflections on the particular role and significance of discretion in these sort of complex areas of law such as anti-discrimination.

Mr BLANKS: If I may address that? It is a very good question. I think the components of the answer include that the Anti-Discrimination Board, or Anti-Discrimination NSW, is designed to be available to the community in a relatively informal way. It is the kind of process which ought to be available to people directly without the need to have to go through lawyers. So there will be a variety of standards of complaints when they are lodged directly by people; there will be some which, as the previous speakers have said, are not fully complete or not specific enough where people need assistance.

There will be others which might be misconceived; there will be some serious issues which require careful investigation. Another component of the board, as I mentioned in opening, is that it works very well when the president is somebody of senior standing, such as a retired judge, and is used to making decisions and dealing with process and is in a position where they can efficiently deal with applications. So I think it is very important that it remains relatively informal, guided by people with expertise, and in those circumstances discretion as to how to deal with matters is an essential part of it so that it does not become rule-bound, a lawyer fest and not really able to perform the function which it is there for, which is to effectively assist in resolving issues of discrimination which are serious issues in the community for a significant number of people.

Mr HUNYOR: From my perspective, I agree everything with that has just been said. The importance of having discretion is that it allows flexibility to avoid injustice and to avoid unfairness. So from here we can try to see all different circumstances and come up with a set of rules that will avoid unfairness. But life is messy, things are complicated, and often the reasons why we rely on judges and presidents and people that are in decision-making roles to make decisions and to be given the discretion is to try to make sure the outcomes are fair and that the context of their values is particularly relevant.

The Hon. ROSE JACKSON: I might draw out one of the reflections you just made there: life is messy, things are complicated. I think, particularly perhaps in this area of law, that is the case, there are often intersecting areas of discrimination and disadvantage. It is pretty clear that there is a barrier to entry in terms of accessing the remedial work of this legislation and the board. My understanding is that there is deliberately a low barrier to entry in terms of making a complaint and trying to access justice for the purpose of allowing people to assert their human rights. I just wondered if you could talk a little bit about why it is important in terms of the effective operation of this Act, that essentially it is easy for people to try and make complaints, it is easy for people to try and get access to the processes that the board can use.

Mr CHATE: Can I say that our client group is made up of people with an intellectual disability. Practically they do not have access to courts, they do not also have access to information in a practical way, not only because of their disability but because of their finances, and in order to be able to be a party in an NCAT

case—I cannot say I have got a lot of cases in NCAT but I have had one where I have had to have a tutor appointed. It is very hard for them to enforce their rights and this Act, as it now stands, because the bar is so low and because advocates can help them make their applications—often our clients only want an apology or an acknowledgement or just something put in place that helps them—this Act the way it is now, having a low bar, empowers them to some extent, and I would hate to see that lost.

Mr HUNYOR: Certainly my experience with discrimination law is that it can be quite complex and technical. Most people do not come thinking they have got a problem with a particular section or a particular type of discrimination; they know something is unfair that has happened to them. So really the point is to make sure that there is very open intake and they be informed because the vast majority of complaints do not end up in a tribunal or a court, they are resolved, and part of the point of having the conciliation-first approach is to try to get people together to talk through their issues and to resolve them. There is an educative function in that, there is flexibility in that; it means you can get things like apologies and changes to systems that a court may not order. So there is real value in having a very wide intake and then making sure that that gives you a chance to filter through complaints and to help people who may not otherwise be able to clearly articulate what has happened to them or the thing that is wrong.

The Hon. NATALIE WARD: I thank you all for your submissions and for appearing today. I accept that the Act, as it stands, is not a perfect Act; I think that is the common ground that we do have, and a number of you have pointed to a comprehensive review. I think we all welcome the opportunity to review Acts in any form, but equally there is a sort of saying in the law that hard cases make bad law, and it seems that, without identifying or going into individual circumstances, there are examples—not many and not the majority—of difficult cases that may well have given rise to some of this review. Bearing that in mind, I just wanted to ask you to comment. There has been a proposal or a discussion around dealing with vexatious complaints to perhaps consider an option for review or discretion around a vexatious complainant as opposed to the president determining a vexatious complaint. Do you understand the distinction I am making and could you comment on whether you think this is something that we could look at at the lodgement stage that might assist?

Mr BLANKS: Perhaps I can comment on that. Of course, there is a process for having individuals declared vexatious litigants in the courts, and then a person who is declared a vexatious litigant must go through a process before being permitted to file an application in court. I suppose your question boils down to whether there should be some similar function applicable to the Anti-Discrimination Board. The issue there is has there been a real demonstrated need for it? Having looked at the material I have looked at for this hearing I can see that there are some concerns about [inaudible] has made numerous complaints, but I am not sure that it can fairly be said that the level of problem that has been caused such as to justify a whole regime for having a vexatious complainant process in the tribunal, the individual concerned has not always been successful in the matters that he has brought; he has been quite successful in a number of matters—

The Hon. NATALIE WARD: I will just stop you there. I do not want you to comment on the individual circumstances; my point is really—and I am not an advocate or otherwise for this view, I am just trying to ascertain your views on it—about whether that may assist as opposed to looking at each individual complaint itself, whether it might assist in a similar circumstance, but I really do not want to comment on the individual.

Mr BLANKS: It probably would not. It would still involve a process. If an individual were declared a vexatious complainant, there would still have to be a process for a complaint that an individual wanted to bring to see whether it ought to be allowed to be brought. So it is not actually going to change anything in substance because there would still have to be an individual review of complaints by the individual concerned.

The Hon. NATALIE WARD: Would you say, of necessity, that discretion is required to make that judgement?

Mr BLANKS: Yes, absolutely. Otherwise you have litigation over whether or not the claimant is vexatious. That is absolutely something that you want to avoid.

The Hon. NATALIE WARD: Yes. Everyone is entitled to their rights and to advocate for their rights. Would other witnesses like to comment on that aspect?

Mr CHATE: I cannot say that I have any experience of representing vexatious clients or that they have been prosecuted by vexatious people. Having read the reasons behind the changes, some cases were identified that did appear concerning. I think it is good that it probably highlights that issue for the president. I do not know but I am just wondering if the ADB has any administrative procedure where they do actually keep a record of people that have made a lot of complaints. It might be that it is something that could be addressed on an administrative level.

The Hon. NATALIE WARD: It is a good question. We may or may not be looking at that very aspect. Mr Hunyor?

Mr HUNYOR: From the PIAC's perspective, we would not support a vexatious-litigant-style approach, mostly for the reasons that Mr Blanks has raised. There would have to be a process around that and you still would not want to be at a stage where that would absolutely prohibit someone from bringing a complaint. They could simply then be put beyond the law and they can be vilified as much as anyone would like. So there would need to be a consideration of each complaint. So it seems to be that it would just add a level of complexity because you would have to go through a whole process around having someone declared a vexatious complainant and then any new complaint would then have to still be assessed to see whether or not it had sufficient merit.

If there is a concern, then having a discretion that allows for the early termination of vexatious complaints, if that was what it was limited to, then that may be a way you could try to achieve a similar thing. But I am not sure that really the Act does not—the Act really allows that already. It is just a matter of making that at an early stage of the investigation. So, from our perspective, we think there are serious concerns with it and not a good enough reason to do it.

The Hon. NATALIE WARD: I do not want to monopolise time if any of my colleagues have questions, but I have one more on costs if we have time. Would each of the witnesses to comment on the question of costs? Some of you have referred to it, helpfully, in your submissions. Thank you for that. Would you elaborate on the costs implications? A couple of submissions have referred to the NCAT aspect and how that might assist, or whether there might be room for amendment or improvement in that regard.

Mr CHATE: For our clients I do not think there should be any change. Our clients do not have any financial resources and I think the rule that each party pays their own costs, as a general rule, is a good one.

The Hon. NATALIE WARD: Thank you, Mr Chate. Would anyone else like to comment?

Ms CATALLO: Yes, can I make a comment on that? I would agree that the costs would take away some of the point of having the Anti-Discrimination Board as it runs because at the moment it is a tribunal where you do not need to be a lawyer, you do not need legal assistance. You can simply go to a website, lodge your complaints and have them considered by the president as to whether or not they should go to conciliation. So to bring in anything to do with costs takes away some of the better advantages of the tribunal as it works at the moment.

The Hon. NATALIE WARD: Are there any other comments?

Mr HUNYOR: From PIAC's perspective, we do not support costs for these sorts of matters. I think in principle it would be hard to argue against a tribunal being able to make, in an exceptional case, a costs award if someone is found to have brought a vexatious complaint, for example. But I think those provisions are already there in the Act. I can check that specifically but I think the tribunal is already allowed to make costs orders in those circumstances and that should be adequate to deal with the situation.

The Hon. NATALIE WARD: If there are no other comments on that, I will ask, finally, about discretion. We have talked about removing discretion but I am wondering if you can comment on the—I know Parliament is not perfect and no-one can foresee every potential issue. There may be unforeseen circumstances that we have not contemplated. It is not a loaded question, but could you comment on that in relation to the removal of the discretion and whether that may impact, whether that would exclude—I guess it is a loaded question, isn't it? I think you mentioned earlier that it may exclude legitimate complaints and that they are often quite complex. Mr Chate, I think you referred to that. Could you expand on that for the Committee?

Mr CHATE: It is the point that clients often do not often appreciate what matters to put in the complaint. For them, they just think, "I have been unfairly treated". They also may not be aware over the amount of time that they have been unfairly treated and what conduct could be discrimination and could not. We are concerned that if they miss out on any part of their claim, if the discretion is taken away and they have no right to go to NCAT, a complaint that does have substance and that they should have their rights to proceed with, will be barred. I think that is particularly unfair. I think the present approach where the threshold is very low and it does [inaudible], as I say, our clients are often just after an apology or to put things right. And, as some of the other speakers said, it gives them an informal forum to try and resolve their complaints and that is really what they want. As I said, I have only got one present case in NCAT. Most of them are resolved at the ADB and we would like that to be kept as it is.

The Hon. MARK LATHAM: I want to turn the focus to the true purpose of the bill, and that is the civil liberties and human rights of the respondents. We have had a 30-minute discussion about the rights of complainants in the system but there used to be a rule, certainly in left-of-centre politics, that if only one person

was done over in the system, everyone would rally around to correct that wrong. Specifically with reference to Mr Chate and his submission, I turn to the case of the taxidriver in Newcastle who had a car accident, ended up brain-damaged, and now spends a fair amount of his time on social media with random comments of no significance to anyone other than the serial complainant at the Anti-Discrimination Board who has lodged twenty complaints about this individual, run down the compensation money that he has had as a product of the car accident. Certainly the last 18 or 19 of those complaints—

Mr DAVID SHOEBRIDGE: Point of order—

The Hon. MARK LATHAM: —the president of the Anti-Discrimination Board has known of that circumstance. Mr Chate, what concern would you have for that individual—

The CHAIR: What is the point of order?

Mr DAVID SHOEBRIDGE: Mr Latham must ask a question, not give a rant or a statement.

The Hon. MARK LATHAM: I asked a question. Mr Shoebridge should withdraw "rant". He is the one who goes to protests, endangering health and economic growth in New South Wales, so I am not going to cop from him that that is a rant. That was a legitimate question and I would appreciate an answer.

Mr DAVID SHOEBRIDGE: The point of order stands.

The CHAIR: Mr Latham is entitled to preface his question with a preamble. He did ask a question at the end. Will you restate the question, Mr Latham?

The Hon. MARK LATHAM: The question was: What is Mr Chate's response to the rights of respondents in the example that I gave where, clearly, the system is doing over a disabled person in a way that people would normally regard as unreasonable, vexatious, frivolous and completely unacceptable by any human rights standard in our State?

Mr CHATE: The only knowledge I have of that case, Mr Latham, was when I read your speech. As you have identified, the respondent in that case would be in our client cohort, so I was quite concerned about that. When you say that it runs down another person's money because of the behaviour that he cannot control, yes, our clients do have behavioural problems that are linked to their disability and that really is a concern that, in that sense, his disability is being exploited. So I would have concerns on behalf of that respondent as well. I take your point that that is an example of a vexatious person. One of the other speakers said, and it is in the Act, that both the Anti-Discrimination Board and the tribunal are allowed to make orders in relation to vexation matters and they are also allowed to make costs orders.

Before, when I said that perhaps it is an administrative thing where you could have a databank where these claims are actually brought to the attention of the ADB and highlighted that it is possibly a matter where a person is getting exploited, then that is a matter I do think should be highlighted and brought to the attention of the president of the Anti-Discrimination Board as a matter of concern. Then at that stage I think the president, bearing in mind that it is possibly a vexatious litigant, I think that then the president should still investigate the matter and then after he has investigated it, then it is a relevant matter about whether he would dismiss it for being vexatious. So to a certain extent I thought that those safeguards were there already. I am just unsure how vigilantly they are used.

The Hon. MARK LATHAM: Mr Chate, you have recognised the problem and you are suggesting some form of remedy. You mentioned this particular individual in your submission. Why did your submission not outline remedies, if not the section 89B (2) (l) solution I have suggested in my bill or a remedy from your disability rights service?

Mr CHATE: My view in my submission was that the powers were there for both the president and also the NCAT to make those orders in relation to those sort of proceedings anyway. So I felt that the machinery was there to deal with the problems already.

The Hon. MARK LATHAM: But, Mr Chate, would you concede after 20 complaints essentially of the same nature being lodged by a serial complainant and the administrative system doing nothing about it, it is time to legislate to protect this individual and people like him who, clearly, are being targeted and damaged—disabled people being damaged—by the system?

Mr CHATE: As I have said, the case that you highlighted really does concern me because it does look like one of our clients has been taken advantage of. I have not read all those cases so I cannot comment on them but if what you have said in your statement is true, I do think it is a matter of concern and I do think that it is a matter that should be brought to the attention of the president of the board. But, as I have said, I think the legislation covers the matter anyway.

The Hon. MARK LATHAM: I will not ask the question a second time, given that 20 complaints have been lodged and nobody has acted to protect the individual. I come to either Mr Blanks or Mr Hunyor on the question of discretion. How can it be explained that New South Wales has by far the lowest threshold of acceptance of complaints in the Commonwealth, and that in Queensland, where the legislation reads that the commissioner "must" reject frivolous, trivial complaints and those misconceived and lacking in substance, the Queensland Human Rights Commission has a far higher level of complaints finalisation per head of population than New South Wales with 84 per cent of the people using the service rating themselves satisfied with their treatment by the commission.

Clearly the evidence would suggest that where the Queensland commissioner must reject complaints, there has been no loss of legitimate complaint-making capacity in the Queensland system. In fact, would you comment on the broader problem of forum shopping? We have many examples now of the New South Wales Anti-Discrimination Board accepting complaints lodged against Queenslanders but no complaints being lodged at the Queensland Human Rights Commission. But New South Wales is having to spend all its money, time and effort to resolve matters and deal with matters that are not even reported on in Queensland.

Mr BLANKS: That is all very interesting. I think I would have to say in answer to that I would need to take that on notice and I would need to see an actual evidence base for what has just been put. I am not sure that that description of the situation is a fair description of the totality of the system and the way that it works. I want to consider statistics for the totality of the way the system works. But coming back to a comment that you made at the outset—what about the civil liberties of the respondents—given that this is, and is designed to be, a low-cost, low-trouble mechanism for [inaudible] complaints, I think it is pretty hard to say that there is an unreasonable burden placed on respondents for dealing with matters—

The Hon. MARK LATHAM: You are kidding. You have got to be kidding. When it is appealed in the court system, this sends people broke.

Mr BLANKS: In the tribunal system, legal representation is not required and there are many cases where people litigate themselves without costs. It does need to be a system where people can bring complaints against each other in a cheap, efficient, low-cost way, and if they are not allowed to do so then problems will arise in other ways. So for a low number of cases which might be thought to be unsatisfactory from some point of view, one has to look at the overall value of the system.

Mr LAWRIE: If I could jump in and address the issue of vexatious complaints and discretion or lack of discretion? Mr Latham is highlighting the Queensland approach. Queensland is actually in the minority of jurisdictions in Australia which do not allow discretion on that point. New South Wales, Victoria, Tasmania, South Australia and Western Australia all retain discretion for the decision-makers and we support the retention of discretion in New South Wales.

Mr DAVID SHOEBRIDGE: Thank you, all, for your submissions and your input today. I have a question about the bill's proposal to delete section 88B. As I read the second reading speech, I think the asserted problem that the mover of the bill is proposing the bill seeks to address is that section 88B allows complaints to be run in, say, Queensland, as we have just heard, or Victoria or other States, and also in New South Wales but it was—I practised in this law a little bit before I changed occupations. It was my understanding that section 88B was probably more about cases perhaps maybe in workers compensation or in tort or in other jurisdictions within New South Wales and ensuring that, if those cases had been run or commenced or if complaints had been made, it did not necessarily exclude the operation of the Anti-Discrimination Act.

The Hon. MARK LATHAM: That is the purpose I outlined in the second reading speech.

Mr DAVID SHOEBRIDGE: But does any witness—

The Hon. MARK LATHAM: It is not about interstate.

Mr DAVID SHOEBRIDGE: Not a committee member. Does any witness want to comment on that?

The CHAIR: Order!

The Hon. MARK LATHAM: I am being misrepresented here.

Ms CATALLO: I can comment on the connection between workers compensation and the ADB. I would agree that the Anti-Discrimination Board can be an effective other place for people to go who have had workers compensation claims, especially if it is a psychological claim that is to do with interpersonal issues that may have issues of sexuality or racism behind it. Then, an 88B conciliation process I have seen be an effective way to work out a way forward for that process to allow the injured worker to be able to get back to their workplace.

Mr DAVID SHOEBRIDGE: Does any other witness have any experience? Maybe there was a tortious claim or a contractual claim or an unrelated claim where an aspect of the conduct complained of was covered and the role of 88B in those circumstances?

Mr CHATE: I have not got any experience. I am sorry.

Mr HUNYOR: I am not aware of any cases involving PIAC, but our understanding of the provisions and the way they work, and from our discussions with others practising in the jurisdiction, is the same as yours, Mr Shoebridge; that the aim is not just to deal with multiple jurisdictions geographically but also different areas of law. And there are good reasons why one set of factual circumstances may raise a range of different harms for which you need to bring a range of different claims to be properly compensated. As we noted in our submission, NCAT is already required to have regard to complaints lodged elsewhere, including their outcomes, so that means that we avoid the situation of double dipping if someone is making claims under different jurisdictions.

Mr DAVID SHOEBRIDGE: Thank you. Mr Chate, one of the other proposals that has been floated around, both in some of the submissions and otherwise, is making NCAT a costs jurisdiction in certain circumstances. Given the financial circumstances of your clients, what would that do in your understanding in terms of their ability to run legitimate claims?

Mr CHATE: Virtually all of our clients would not be able to run any claim at all. As I have previously said, even NCAT is a difficult venue for our clients because they cannot express themselves and, in the case I have at the moment, we have had to have a tutor appointed. When it comes to a hearing and there is some cross-examination, I have real concerns about what sort of fist my client can make of his case. So it is the barrier—the big barrier is the disability and it makes NCAT very difficult for us, but if my client was at risk of any sort of costs, he could not run the case. A lot of our clients are under the NSW Trustee & Guardian, so the added protection they would have is that even if they got a costs order against them, it would be difficult for the other party to enforce it. But I think it would be very prohibitive for our client to make it a costs jurisdiction.

Mr HUNYOR: I referred before, in an earlier answer, to the issue of costs in vexatious matters, and I did not have it at the front of my memory, but it is section 60 of the Civil and Administrative Tribunal Act that allows for a costs award in special circumstances. So the general rule is no costs, but it specifically refers to proceedings that are frivolous, vexatious or otherwise misconceived or lacking in substance. So there is provision for that in appropriate cases but the general rule is the appropriate one for all the reasons that you have heard.

Mr DAVID SHOEBRIDGE: The mover of the bill seeks to highlight a number of cases where, he says, that the law is not working. But can any of you speak about the general run of how this jurisdiction works and whether it is actually a useful forum to allow what might otherwise become entrenched disputes or genuine grievances to actually be addressed and allow an informal process for people to be heard, for conduct to be addressed and for mutually beneficial results to happen and the benefit of doing that in a non-litigious, fairly open forum? Do any of you have any experience in that regard? Mr Chate?

Mr CHATE: Yes. At the Anti-Discrimination Board level we have had some cases where TAFE has made learning adjustments for our clients, the Department of Education has also made some behavioural support adjustments and some learning adjustments for our clients. We have had some issues where our clients in hospitality and service industries have kept their jobs because the management has been educated about their disability and their behaviours and there are some support that have been put in place. I have had some cases where people have management of gymnasiums and hotels. They have reviewed their procedures and apologised to our clients for excluding them from a hotel, even from religious gatherings.

It has been a bit of an education process, understanding how the behaviour is linked with the disability. We have had some matters where we have talked to proprietors of vending machines, making them more easy to use for our clients. So they are things that have been worked out through mediation at the Anti-Discrimination Board without going to the tribunal, and that has been a good venue for some of our matters. As I say, most of our matters do not even get to the ADB because we send letters to the other side and try and work it out before that. But it is a good place for them to be able to go and try and work it out if we cannot work it out before then.

Mr DAVID SHOEBRIDGE: So it is the tip of the iceberg, the matters where things are fractious and relationships are not healed, but underneath that, is it your experience that there are many cases where it is helping people overcome disputes, overcome barriers and get on and have productive relationships?

Mr CHATE: That has been my experience. As I said in my submissions, I have not had clients who have been vexatious. They have gone there to try and fix up a problem with their lives and it is all they have aimed to do. Most of the time it has worked for them.

The CHAIR: We have come to the end of the session. Mr Blanks took a question on notice. The secretariat will be in contact with you soon, certainly within 21 days you have the opportunity to respond. Thank you for coming today.

(The witnesses withdrew.)

(Short adjournment)

CHRISTOPHER BROHIER, Legal Counsel, Australian Christian Lobby, sworn and examined

NEIL FOSTER, Board Member, Freedom for Faith, sworn and examined

MICHAEL STEAD, Anglican Bishop of South Sydney, Anglican Church Diocese of Sydney, sworn and examined

The CHAIR: Would each witness like to make a short opening statement? Please keep it to no more than a few minutes because we have limited time.

Dr STEAD: I will take our submission as read. Having also read a number of the other submissions, it is apparent that the president's discretion to decline a complaint, and the grounds on which she may do so, is going to be a key issue, so I would like to focus my opening remarks on this issue. As you will be aware, the president may decline a complaint either when the complaint is first lodged under section 89B or during the investigation of the complaint, section 92. I have created a table using the data from the ADB annual reports for the past five years. I understand that this table has been distributed electronically to members of the Committee but I am going to get very low-tech and just hold it up on the screen and talk to it for a moment because the table shows what has been happening with the decline rates over time.

In particular, I note that over the first three years in the five-year series, 17.9 per cent of complaints were declined before investigation and 9.9 per cent were declined after investigation, meaning that a total of 27.8 per cent of all complaints were declined. The decline rate, however, has trended down markedly since July 2017, such that the combined percentages of declined complaints in 2018-2019 is just 14.4 per cent; that is, a bit over half of the average from the first three years in the series. The table for the annual reports shows that the grounds and areas of complaints have remained relatively constant over the five-year period so it is reasonable to assume that the rate of unmeritorious complaints should also have remained relatively constant. So my question is why the rate of decline of complaints has dropped so markedly?

One possible explanation is a change in the exercise of the president's discretion. Submissions that are opposed to the removal of the president's discretion—that is, changing the word "may" to "must" in sections 89B and 92—argue that this may lead to the injustice of a valid complaint being terminated because the president was unable to exercise a discretion. This is very unlikely to be the case. The power to dismiss a complaint in section 92 is subject to the words "the President is satisfied that". That is, the president must be satisfied that the complaint is "frivolous, vexatious, misconceived", or satisfied that no part of the conduct, if proven, would amount to a contravention of the Act, or satisfied that the complaint is being dealt with by another body, and so on.

If the president is not satisfied of these things, whether because of lingering doubts or fears of potential injustice, then there is not merely a discretion not to dismiss but, rather, the president has no power to dismiss. It is necessary to change the word "may" to "must" in section 92 (1) to ensure that non-meritorious claims—that is, a claim where the president is satisfied that the claim is frivolous, vexatious or misconceived, is satisfied there is no contravention of the Act and so on—do not proceed to conciliation or referral to NCAT. Where a complaint is clearly unmeritorious, there should not be the option to proceed to investigation because of the impact that this has on the respondent. The ADB accepted a complaint from serial litigant against Israel Folau in—[2]

The CHAIR: I will have to stop you there because you cannot make adverse mention of named individuals during this hearing. I ask that you table the remainder of your statement as a submission so that the hearing can continue. I cannot have you mentioning names while the hearing is live-streaming.

Dr STEAD: That is fine. I will finish then with the comment, without mentioning any names, which is to say that a complaint that was later dismissed at a later stage incurred significant legal expense for the respondent. That is, there is a cost to unmeritorious claims being allowed to proceed to investigation. Thank you for the opportunity to make this opening statement.

Mr BROHIER: The changes proposed in the Anti-Discrimination Amendment (Complaint Handling) Bill 2020, in our submission, are modest changes that will streamline the complaint process and, in some cases, bring New South Wales law into line with other jurisdictions, codify existing law and make the whole process in line with the aim of the Anti-Discrimination Act; that is, to promote equality of opportunity among all persons. And for the most part, as we have outlined in submission number 23, the Australian Christian Lobby supports it.

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

The three main changes are, firstly, the change from "may" to "must" in sections 89B and 92. This is a modest change which will streamline the process and probably substantially reflects current practice. The second big issue is the additional matters in sections 89B and 92. Some of these bring New South Wales law into line with other jurisdictions, reflect current law, or are useful to promote what is the underlying issue of equality of opportunity and it source principle; that is, natural justice. The third big issue is the abolition of the opportunity to take a complaint which is declined to the tribunal. We suggest something different from the bill. We suggest that that opportunity be allowed to continue but there be consequences if the complaint is taken on and subsequently loses in the tribunal. We have outlined them in our submission.

Mr FOSTER: Thank you for the opportunity to introduce my submission. I will assume that people are generally familiar with it. Freedom for Faith is a Christian legal think tank which is concerned to see the promotion and protection of religious freedom of Australians. We support, of course, the general framework of discrimination law in New South Wales but we do think that there is a need for refining of the processes because the processes can create injustices in some circumstances. We actually think that there are some specific cases that have been drawn to attention which illustrate this concern—the fact, for example, that it took some months recently for a complaint of vilification to be dismissed as an abuse of process. An example of that, and a long-running series of 36 complaints against one person, none of which had been substantiated, is another example.

In general terms, we support the amendments in the complaint handling bill that allow earlier termination of complaints which have no merit. These sorts of amendments were actually agreed to on a bipartisan basis in the Federal law and they seem to us to have a lot of justifications for adoption in New South Wales law. On balance, though, we do not support the proposal to remove the right of referral to the NCAT from the president of ADB where they have made a post-acceptance decision to terminate a complaint. We can see the arguments either way, but we see the danger of the president refusing a meritorious complaint at an early stage is a real one. We do suggest that a complainant who persists with a complaint after the president has decided not to continue should be at serious risk of paying the respondent's costs should NCAT agree with the president. Finally, we are concerned about something that is not actually dealt with in the bill, but we think needs further attention, which is the fact that, currently, respondents are not given notice when a president has commenced an investigation. We are of the opinion that notice should almost always be given, except in unusual circumstances.

The Hon. ROSE JACKSON: I want to ask about a reflection on the process here, because a number of submissions from people for and against the proposed amendments in this bill have suggested that a broader, more comprehensive review of the Anti-Discrimination Act, which is quite an old law in New South Wales, would be warranted. I would imagine that your organisations would also support that because I assume that perhaps you would be interested in stronger protections against religious discrimination, which obviously has been part of public discourse.

I think there is a view that piecemeal picking at particular elements of the legislation is not actually the best way to address deficiencies in our discrimination law in New South Wales. What would be better is for everyone who wants to see amendments, not just to complaint handling, but to the heads of areas where discrimination can occur and all those sorts of things, to participate in a broader, more comprehensive review. Why do you think this particular bill is so necessary now when I am going to assume—correct me if I am wrong—that there are broader, more comprehensive amendments that you would like to see to the Act?

Mr BROHIER: If I could speak to that first. I respectfully disagree with that proposition. Accepting the need to look at the whole issue, and I have clear views on some of the issues with the whole anti-discrimination structure, what we are saying—and I have acted for people right across the country, from Western Australia through to Queensland and New South Wales—is that in the process of complaints there is a punishment. The reason we are speaking to this bill is because this bill is now on the table. That has what has been put up by the Hon. Mark Latham and so it is appropriate that we put a submission into it. Where there is a problem with the actual process of complaint, that needs to be dealt with. In our submission, this bill does that.

Mr FOSTER: Can I make a brief comment? From the point of view of Freedom for Faith, our concern very much is in terms of religious freedom. We have made a number of submissions on the Federal processes about discrimination and the religious discrimination bill. But as Mr Brohier just said, this bill is before the New South Wales Parliament, it deals with some problems that we see in the current system and therefore we think that it is worth dealing with. That is why we are making a submission.

Dr STEAD: Just to add to that, my comment would be that, whilst we support the further reforms to the bill, particularly around religious freedom, we would not want to see that as an alternative to the issues with the complaint handling process being dealt with now. In particular, it would be disappointing if the resolution of this issue was kicked off into the long grass, as it were, for several years while the more comprehensive reforms were

considered. My view would be, deal with the complaints handling - this is quite simple to deal with and then return to the questions of wider reform in due course.

The Hon. ROSE JACKSON: Yes, I suppose concerns have been raised that once you go down this path of piecemeal, bit-by-bit legislative amendment—this section here, that section there—it actually skewers the capacity for that broader, more comprehensive review, because we are caught up spending our time doing hearings and committee reports on individual pieces, so the capacity to actually do that broader, meatier review is lost, because time is consumed with this little bit here and this little bit there. Does that not concern you at all, that in fact this very process is kicking that broader examination of issues like religious discrimination into the long grass?

Mr BROHIER: That is the history of legislative reform, is it not? You can look at the schedule to the New South Wales Anti-Discrimination Act and you will see lots of amendments. That is the way Acts work. Parliament proposes something, because we are not perfect, something is put up and it is tested in the courts, we find problems, it goes back to Parliament, you fix that up and then something else happens. That is just the history of our system. Respectfully, that is not a reason to put off dealing with a problem, in my submission.

The Hon. ROSE JACKSON: We will see when we get to it.

Mr FOSTER: I just wanted to briefly respond in the sense that this can be seen in a way as a minor technical thing which is taking up time but, the fact is, it is having a serious impact on some people in the community. You only know that when you see how it works on the ground in relation to real cases. Now, I think it is a bit unfortunate that the Committee has decided that they are not really going to look in any detail at actual cases which have given rise to this particular problem. But, at any rate, the fact is on the ground there are people who are seriously concerned about some of these issues. I think it is worth dealing with those things rather than leaving it for the overall process, which, as we have seen in the process that has happened through the Federal Parliament, can take a long, long time. I think if there is a problem we should be dealing with it.

The Hon. ROSE JACKSON: Yes. I think, to be fair, there is some concern about the separation of powers and having parliamentary committees second-guessing decisions of courts and tribunals all the time. I want to ask, in terms of the substance of this amendment, the suggestion has been put—obviously you would be familiar with the evidence that we received prior to your contributions—that changing the access provisions in sections 89B and 92 would make it more difficult for some matters to be heard. That was the evidence that we received. I wanted to ask, perhaps drawing on the organisations that you are representing and their root in faith-based advocacy, for example, Dr Stead from the Anglican Church, what concerns the Anglican Church and its faith-based principles about people having a very low entry in terms of access to justice? Why is that of concern to you?

Dr STEAD: I am very much supportive of the fact that any meritorious claim ought to be able to be tested and that we need to have a very low bar for entry into the process. My concern is that I do not believe that the changes that are being proposed are actually going to have the effect of removing any meritorious claims from the system. The whole point is we are trying to introduce into section 89 the possibility that a claim that the president is satisfied is vexatious, misconceived or trivial, is able to be excluded at an earlier point. I am very confident in the president, that any valid claim is not going to be firstly categorised as vexatious or misconceived.

The Hon. ROSE JACKSON: The concern specifically was some of the wording around the dismissal of a complaint—for example, one that lacked substance—in whole or in part. Many of these discrimination complaints are complex complaints involving various different levels of treatment that someone has received. Some of those elements can be very substantive, but perhaps people are not putting together these complaints with lawyers, they do not have legal representation, they include elements in their complaint that are less significant, that have less substance. The suggestion that the president would be required to dismiss a complaint because just one part of it lacked substance, I suppose that would be a reason why some people would suggest that this would lead to the dismissal of claims that broadly had substance, but perhaps one element, which was not prepared by a lawyer, was a little bit less significant.

The Hon. TREVOR KHAN: That is not the law.

Dr STEAD: Can I respond to that?

Mr BROHIER: Could I go first? I think that misunderstands the effect of the legislation, because the bill does not amend section 89B (4), which makes it clear that a declined decision can relate to the whole or part of the complaint. That is the same with section 92. A decline can relate to the whole or part of the complaint. Those submissions, in my respectful submission, misunderstand the effect of the bill. It does not take away 89B (4), nor does it amend the part of section 92 that says that the decline can be in relation to part of a complaint.

The effect of the amendment will be that the part that lacks substance will be declined and the part that has substance will continue.

Dr STEAD: If I could just add to that, I think not only does it ignore section 89B (1), which clearly says the president can accept or decline in whole or in part, so it contemplates that, it also ignores the effect of section 91C, which allows amendment of the complaint. If the complaint is defective in form, or if some part of it is inappropriate, the president is able to assist the complainant to amend the complaint, which then can be treated as a new complaint under section 89B. I think where the president is aware that there is some technical problem with the complaint, there are already remedies within the Act that allow for that to be fixed. It is not going to be kicked out on a technicality, which I think is the concern being expressed.

Mr BROHIER: The Hon. Rose Jackson, if you look at the schedule to the Anti-Discrimination Act, almost every section has been amended. Secondly, you mentioned a concern about separation of powers; there can be no issue of separation of powers for Parliament to amend an Act of Parliament. That is just a complete furphy.

The Hon. ROSE JACKSON: That is not what I was referring to at all, Mr Brohier. I was referring to why the Committee had chosen not to use the parliamentary processes to re-litigate specific matters that had been dealt with by the tribunal in which individuals did not like the outcome. That is what I was referring to. The Committee has made an express decision not to reconsider individual matters. I think that is quite an important decision that the Committee has made. That is what I was referring to.

Mr BROHIER: That does not affect the bill.

The Hon. ROSE JACKSON: No.

The Hon. TREVOR KHAN: Dr Stead, I will ask you the question, but I am not limiting it to you. I am looking at 89B (2) and the issue about the changing of the word from "may" to "must". Could I ask you this—you might actually be getting somewhere—if you go to 89B (2) (a), that if the president were to find that "no part of the conduct complained of could amount to a contravention", there is a compelling argument that, in my view, the complaint could be dealt with by "must". However, if you go to 89B (2) (b), which is the 12-month exercise, and I am inviting you to comment, I am less compelled that that ground for potential dismissal should be [inaudible]. That is, there seems to be in 89B (2) a range of alternatives, some of which are compelling for dismissal, but others not so. If we take 89B (2) (b) as an example, why do you say that if, in whole or in part, a complaint is older than 12 months it should necessarily lead to the dismissal of the complaint?

Dr STEAD: I think you have to read 82 (2) (b) in light of subclause 1 which precedes it. What is contemplated is that where the whole of the complaint is outside 12 months, then the whole of the complaint must be declined. Where part of the complaint is outside 12 months, than that part must be declined in part. I take it that it is not saying, "if there is range of behaviour that stretched over 24 months, then you have to dismiss the whole thing". I think it is requiring the president to separate the complaint into parts and to dismiss that part which is outside the statutory limit. That is what I take to be the combined effect of subsections 1 and 2 read together.

The Hon. TREVOR KHAN: I can accept that, but let us suppose there has been a course of conduct, and an example has been used earlier today of sexual harassment or perhaps discrimination on the basis of sexual orientation, although that is not the wording used in the Act. Let us suppose it is one of those two. If it has been a long course of discriminatory conduct of someone, and it being older than 12 months, why should it simply be ruled out of the game? There may be legitimate reasons why the complaint has not been brought earlier.

Dr STEAD: I take it that that is up to the Parliament to change the effect of the Anti-Discrimination Act to extend that period of time so that it can consider complaints which relate to behaviour that stretched over more than 12 months. But it seems to me the clear intent of the current form of the law is to restrict the complaints process to things which have occurred within the past 12 months. I am not disputing the possibility, but what we are saying is we want to give a discretion to the president of the ADA to do something that the Act does not contemplate, which is to consider a pattern of behaviour that stretches over many years and make that part of a complaint. I take it that the current drafting of the Act requires at least one act of discrimination which has occurred within a 12-month period to activate the Act. If that has occurred within the 12-month period, then it is in, and the complaint can be considered. But if it is not, then I do not see how giving a discretion to the president helps in any way.

The Hon. TREVOR KHAN: Really? Well, you probably have not got me on that one. One of the things that interests me is, for instance, we had the NSW Gay and Lesbian Rights Lobby appear on Tuesday, which takes a certain view. People representing people with various disabilities take a view. The organisations that appear on this panel, who you would generally say are not receiving the benefit of the legislation, take an opposite view. If we harden up the bill now—I cannot predict the future—and discrimination on the basis of religious belief

becomes a ground, are you going to be as comfortable in terms of having raised the bar for potential complainants at that point in time?

Dr STEAD: I do not think we are raising the bar, as I said in response to an earlier question. I genuinely want to see every meritorious complaint be considered. I think it is really important to have a robust anti-discrimination commission. What we are trying to say is not raising the bar for meritorious complaints; we are just giving the option for dismissal for manifestly unmeritorious complaints at the outset. If I could just return to the question about—

The Hon. TREVOR KHAN: At 89B (2) (b), that is not going to a manifestly unmeritorious issue.

Dr STEAD: No, but just to return to that question, if you look at the number of complaints that have been dismissed under that subsection, it is a fraction of the percentage of the total. That is, it is an average of 2 per cent over the past five years of all claims where there is some issue as to time and that is in part or in whole. To be honest, I would be quite happy to excise that section and give the president discretion on the question of time. It is more the question of section (2) (a), (c), (d) or, for example, the newly proposed (2) (f), they are the ones I think we ought not to have a discretion. Where the president is satisfied that there is no case to answer, we should boot it out. If we want to bracket out the timing one, I am happy with that.

The Hon. TREVOR KHAN: I will just go to the statistics. It seems to me we are probably in agreement. You would need to go through each of the subsections and deal with those issues separately, rather than, in a sense, what some of the submissions do is simply say just change a word and everything will be rosy. But let me go on. You said those statistics. I am interested in the statistics that you said, because whilst there seems to have been a drop-off in complaints that have been declined, and you have highlighted those two levels, if you go down to the bottom of the columns it seems that there has been an increase in the number of complaints that have been withdrawn or dismissed. Am I right in that interpretation?

Dr STEAD: Withdrawn or abandoned, rather than dismissed.

The Hon. TREVOR KHAN: Sorry, yes. You are quite right. I do not have it in front of me. I am left with a concern—I am not accusing you of mala fides in any way, but the selective reference to some of the statistics without looking at others may create an impression that there has been a change in behaviour, whereas in fact what it might be is that complaints that were previously dismissed are now, through an exercise in encouragement, being withdrawn or abandoned by the complainant. The statistic may not actually demonstrate the point that you are seeking to do by it.

Dr STEAD: With respect, I think I would offer a slightly different interpretation, because I understand that those two figures were actually referring to complaints where they have got through the investigation stage. So it is not that they have been withdrawn prior to investigation, but they have got through the initial hurdle and then they have subsequently been withdrawn or abandoned. So what it means is—

The Hon. TREVOR KHAN: During the investigation phase, though, is that right?

Dr STEAD: It is after they have been accepted. So what it says to me is that we have lowered the bar, we have let in unmeritorious complaints, people have been put to unnecessary expense to defend claims, only to have the claim subsequently withdrawn at the eleventh hour when it should have been knocked out earlier.

The Hon. TREVOR KHAN: Well, let me ask you this. You say it is at the eleventh hour, just looking at the statistics, if we are dealing with the phase after 89B, so the investigation has commenced, that withdrawal or abandonment of the complaint could have been at any point, could it not, from the acceptance of the complaint, which we could say is the first hour or perhaps the second hour, through to one minute before midnight, is that right?

Dr STEAD: Yes.

The Hon. TREVOR KHAN: So that is not at the eleventh hour, is it?

Dr STEAD: Absolutely. I would like to have more information. It would be lovely to have a statistic to say how much respondents have spent on legal fees defending claims to be able to work out—I only have an instinct that people have spent a lot of money defending unnecessary claims. It would be nice to be able to have some assessment of that.

The Hon. TREVOR KHAN: Yes. I might have some sympathy with that proposition but, if we go to your statistics, you would agree with me that if what has happened is that the ADB has simply said to a complainant, "There is no substance to your complaint, we can either dismiss it or you can just pull it," that may appear in the statistics no longer as a dismissal, but simply as an abandonment or withdrawal of the complaint, would it not?

Dr STEAD: That is certainly true, but my pushback would be to say it should have been knocked out in the first place. There is no reason that I can see why 18 per cent of claims were knocked out in 2016-17 and only 9 per cent in 2018-19. Half the number of complaints were knocked out. That suggests to me there are a whole lot of complaints which should have been dismissed at the outset that have got through. I take your point, they may well have been withdrawn a month later and the respondent was not put to significant cost, but why were they not knocked out in the first place?

The Hon. TREVOR KHAN: Indeed. They could have been abandoned or withdrawn after the investigation had commenced, but before the respondent is even advised that a complaint was lodged.

Dr STEAD: Yes.

The Hon. TREVOR KHAN: So a respondent may not have been put to any cost at all; indeed, living in blissful ignorance.

Dr STEAD: That is true.

The Hon. NATALIE WARD: There is a third scenario, is there not? Perhaps a proportion of those claims have been settled, conciliated or achieved the purpose that the tribunal is there to achieve.

Mr BROHIER: No, that is not correct, because the statistics show the claims that have settled either before conciliation or after. There is a separate stat for those which have been declined and those which have been withdrawn or abandoned. Some 18 per cent have been withdrawn and 18 per cent have been abandoned, so they are separate stats.

The Hon. NATALIE WARD: But you do not accept that in those ones that have been withdrawn perhaps they have been sorted out between the parties, that is why they have been withdrawn.

Mr BROHIER: No, because there is a specific category of settled before conciliation. There is a specific category. That is 7.5 per cent in the 2018-19 report.

Dr STEAD: And the rate of settled claims has been consistent across the five years. It has always been about 25 per cent /26 per cent in total. It varies between before and after, but basically about a quarter of the cases heard by the ADB will proceed to an agreed settlement.

The Hon. NATALIE WARD: All jurisdictions have that. That is not a unique feature of this jurisdiction.

Dr STEAD: No, that is a good thing. Settled at conciliation is a good outcome, I am not denying that. I am just saying that letting unmeritorious claims through the gates at the outset does not increase the rate of settlement.

The Hon. NATALIE WARD: That is the case in any jurisdiction. Unmeritorious claims may well get past the first post, because that is the point of being able to assert a claim and potentially settle it, is it not?

Dr STEAD: Yes, but that—

Mr BROHIER: No, that is not the point in any jurisdiction, respectfully—

The Hon. NATALIE WARD: [Inaudible].

Mr BROHIER: —because if you are in the civil jurisdiction you have to plead something that starts a cause of action—

The Hon. NATALIE WARD: I understand that [inaudible].

Mr BROHIER: This Act does not require you to do that. You just have to put something in and the gatekeeper is supposed to look at it and say, "That cannot go on." Respectfully, what this amendment suggests is the gatekeeper should do that and it gives the gatekeeper the opportunity to look at the complaint and say, "That does not fit in, out it goes." That is all it does.

Dr STEAD: What we are suggesting is nothing more than already exists in the Federal law in section 46PH of the Australian Human Rights Commission Act, which gives the president the power—in fact it requires that they must terminate a complaint which is trivial, vexatious, misconceived or lacking in substance. What we are asking for is not novel in this jurisdiction; it is what the comparable Federal law has.

The Hon. NATALIE WARD: We may have to agree to disagree.

The Hon. MARK LATHAM: Thank you very much, Dr Stead, for the data you have presented. In explaining the sharp increase in the acceptance of complaints, do you think there is a cultural reason that these

tribunals take on a life of their own, particularly this one, after 43 years of the statute's existence? I went back and read Neville Wran's second reading speech in 1976. I am sure if he was alive today he would be horrified at the idea that we are policing municipal library matters in Queensland for starters, as well as all of the other serial complainant problems. Do you think there is a cultural problem here and it is right for the Parliament in identifying the problem to step in to make sure that the complaint acceptance is administered effectively? Would you also agree that it is a disaster for respondents in vexatious and frivolous matters to receive one of the letters that they are under investigation by a government tribunal, and all the angst, the cost and the worry that goes with that?

Dr STEAD: If you look at the original aims of the Act, and you alluded to Neville Wran's speech 40 years ago, one of the aims of the Act was about promoting tolerance. I think what has changed is the understanding of what tolerance means, which is actually about allowing a diversity of viewpoints. We are not mentioning specific litigants, but a number of the issues that have triggered these particular problems have to do with using anti-discrimination legislation as a means of enforcing a particular ideological viewpoint and not tolerating a divergence of views. I think that is probably what has changed over the years and that is why this needs to be handled. The legislation is being used for the purpose for which it was not intended: not to bring about positive social change, to change attitudes, but to enforce a silence on particular issues; to force people not to articulate their deeply held beliefs because of a fear of being accused of vilification under one of the sections of the Act. I think that is what has changed in the 40 years.

The Hon. MARK LATHAM: If I could now come to the Australian Christian Lobby submission on page 4 and the case study concerning Israel Folau. As a question of law, we heard from the president on Tuesday, to the surprise of some of us, that she is taking an absolute discretion now in the administration of 89B. Even on matters where the intent of the Parliament is clear, she sees an absolute discretion available to her. What of this argument about Folau as a religious preacher? Under sections 56 and 49ZT the president had no discretion at all. It is very clear in the black letter of the law that Folau should have been exempted as a religious preacher articulating views consistent with his religious beliefs. What is the extent of the problem here, where the president is stepping outside the law in this particular case in allowing this matter to proceed?

Mr BROHIER: I would submit that the discretion given by 89B and 92 should be, on any interpretation of the statute, weighted towards dismissal if, for example, the president finds that a case is without merit under section 92 or does not come within the terms of the Act. It cannot be that the president can properly exercise a discretion if the president makes a finding that the conduct under section 89B does not come within the terms of the Act, but allows the complaint to continue. That must be an error of law. Respectfully, it surprises me that the president would assert that there is a wide discretion to allow a complaint to proceed even if it clearly infringes something like 89B (2) (a). That cannot be correct, respectfully.

Secondly, the amendment to 89B, which seeks to bring in consideration of the exemptions like 56, that is a sensible proposal because one of the considerations the president must take into account, even under the current Act under 89B (2) (a), is whether it falls within the terms of the Act. If, as in the Folau case, there is a clear religious preaching issue, that should be taken into account even under the current laws. Respectfully, codifying it as your amendment does, Mr Latham, is quite proper in my submission.

The Hon. MARK LATHAM: Further on in that case study at page 4—it was mentioned earlier on I think correctly by Mr Shoebridge that this Act works at its best when it brings people together, when they resolve their differences through conciliation. It is a statute that builds greater trust as people cross these various identity boundaries and get to know other people better and there are apologies and reconciliation. That is a very good thing. But in the Folau case, surely that had already happened at the Fair Work Commission where Rugby Australia and Folau—

Mr DAVID SHOEBRIDGE: Point of order—

The Hon. MARK LATHAM: —arrived at a mutually beneficial settlement.

Mr DAVID SHOEBRIDGE: I thought we had a pretty clear position that we were not dealing with individual cases. This is clearly an individual case.

The Hon. MARK LATHAM: It is a public submission that was published at page 4.

Mr DAVID SHOEBRIDGE: I was not here when that ruling was made. A decision was made on Tuesday. I have heard it repeated multiple times and that was my understanding. That is the point of order.

The Hon. MARK LATHAM: We published this submission. So we cannot talk about page 4 of the submission. Is that the proposition? Why censorship?

The CHAIR: I think it is quite okay to talk in terms of individual cases where they are illustrative of the terms of reference. But at any time to talk about individuals in relation to those cases should not be done and it is improper. We should stay well away from that. Now, Mr Shoebridge—

The Hon. MARK LATHAM: Hang on, can I get an answer to my question, please?

The CHAIR: Yes, you can. What was your question?

The Hon. MARK LATHAM: Why did we have to re-run the Folau matter when it had been dealt with to mutual satisfaction in the Fair Work Commission last year, and why did the tribunal in New South Wales take up four months of effort and resources—and obviously angst and expense for the respondent—to deal with the matter a second time?

The CHAIR: Who is that directed to?

Mr BROHIER: That is quite correct. That is why a provision like vexatious, frivolous, without merit or without substance, should in our submission be brought into 89B. There can be no argument, in my submission, that a complaint that is lacking substance or that is frivolous or vexatious should not go ahead. The argument that this will somehow stifle meritorious cannot have force because the president has to make a decision that these complaints lack substance, lack merit or are frivolous. If that is the finding, clearly they should not get past the gatekeeper.

Mr DAVID SHOEBRIDGE: As I understand it, you all support the amendments to 89B proposed in the bill, is that right?

Mr BROHIER: Yes.

Mr DAVID SHOEBRIDGE: If I was to understand your position, Dr Stead, and the rest of you, you say that the reason you do it is because it reflects 46PH of the Federal law, is that right?

Dr STEAD: Correct.

Mr DAVID SHOEBRIDGE: You will agree, do you not, having read the two provisions, that the proposed amendments under 89B go well beyond the provisions in 46PH and you are actually putting a false equivalence to us, are you not? You know it goes well beyond 46PH, do you not?

Mr BROHIER: Respectfully, that is not correct. What Dr Stead said was the may-must distinction. That is what he was talking about and, respectfully, that is incorrect.

Mr DAVID SHOEBRIDGE: But you know, don't you, you have come here having read 46PH. You know that the "must" provision in 46PH only applies to whether it is trivial, vexatious, misconceived, lacking in substance or if there are no reasonable prospects, and the balance of 46PH is discretionary. You are not trying to suggest black is white, are you?

Mr FOSTER: With respect, the point that was being made—

Mr DAVID SHOEBRIDGE: It does not need respect, just an answer.

Mr FOSTER: The answer is that the point that was being made was about those core matters that you have just mentioned, frivolous, vexatious and all those sorts of things. No-one is asserting that there is an absolute identity between the Federal legislation and the New South Wales legislation.

Mr DAVID SHOEBRIDGE: Well, you were.

Mr FOSTER: Simply that this is a model that has been adopted in relation to those important issues.

Mr DAVID SHOEBRIDGE: Well, you were. You were saying that this model is 46PH. It goes miles beyond 46PH. Do you accept that now that I have pointed it out to you?

Mr BROHIER: Respectfully, Dr Stead was not saying that at all. He was saying that the may-must distinction is in 46PH and, respectfully, he was not trying to [inaudible]—

Mr DAVID SHOEBRIDGE: Let us be clear, you cannot try and tell me black is white. The bulk of the provisions in 46PH are discretionary. There are only two provisions that are mandatory. What you have put to this Committee is plainly misrepresenting the Federal law. Do you now accept, when you go and have a look at 46PH, when you say that the proposed amendments in this bill mirror 46PH, that this is just plainly not true? It goes miles beyond the Federal laws.

Dr STEAD: With respect, Mr Shoebridge, you are putting words into my mouth that I did not say. I did not say that this entirely mirrors—Mr Brohier's point is correct. The point I was making was that the may-must distinction is what is encoded into section 46PH.

Mr DAVID SHOEBRIDGE: One small part of 46PH. Do you now accept that? It is only one small part of 46PH.

Dr STEAD: It is not that I now accept that; I have accepted that all along. The point is that 46PH is broadly equivalent to probably three of the provisions that are proposed to be inserted. It is not just one of them. The fact that vexatious, frivolous, misconceived, no reasonable prospect of being settled or dealt with in another jurisdiction—again, it is not; it is analogous to. It is certainly not representing the provisions, but three of Mr Latham's provisions are reflective of things which are in section 46PH. I never made the point more than that. Certainly there are other things that Mr Latham has introduced which go beyond section 46PH.

Mr DAVID SHOEBRIDGE: Here is one of the provisions which you support, and can you tell me how you think this will work in practice? You support amending the law so that, "the president must dismiss a matter if the president is of the opinion there is another more appropriate remedy that should be pursued in relation to the complaint or part of the complaint." How are you proposing that that happens? Are you proposing that the president has to get their own legal advice, consider an array of other legal remedies and form a view about other potential remedies? It would appear to me that that is what you are requiring; basically the president lawyers up to work out other remedies, and then if they form a view then they must dismiss it. Are you really proposing the use of public resources to do that?

Dr STEAD: No, because I do not think that that is how it would work in practice.

Mr DAVID SHOEBRIDGE: That is what it says. They would have to lawyer up every complaint. That is a bizarre proposal.

Dr STEAD: It says "if the president is of the opinion that", which is equivalent to saying "if the president is satisfied that". It is the same point that I made in my opening statement. That in itself puts a very high level of discretion back onto the president.

Mr DAVID SHOEBRIDGE: It is mandatory. "If they have the opinion." How would they form the opinion without lawyering up and getting the legal advice? Do you just say that they make it up one day with their cornflakes?

Dr STEAD: No.

Mr DAVID SHOEBRIDGE: They would have to go to extraordinary public expense. Surely you do not support that now that you reflect upon it, surely not.

Dr STEAD: With respect, the clause does not require the president to form an opinion. It is "if the president is of the opinion that", and the president in 99 per cent of cases is going to say, "I have no opinion on this because I have not made the necessary inquiries." It is only going to be in the case where there clearly is a more appropriate remedy because it is already being pursued through the courts that the president would have—

Mr DAVID SHOEBRIDGE: But it does not say that. It distinctly does not say that. It does not talk about other courts or other things. If the president is going to be diligent and do the president's job under this proposal, the president would have to consider other remedies and to do that would have to lawyer up and consider an array of other remedies. I cannot believe you are supporting that kind of public expenditure.

Mr FOSTER: Mr Shoebridge, that is not what the provision says. The provision, as Dr Stead has said, simply comes into operation where the president has formed an opinion and it does not require the expenditure of public money to get to that point. It simply requires the president to be of that opinion.

The Hon. MARK LATHAM: They do it in Tasmania that way. Take it up with the Green MPs in the Tasmanian Parliament.

The CHAIR: Questioning has come to an end. Thank you very much for attending today.

(The witnesses withdrew.)

(Luncheon adjournment)

NATHAN KEATS, Co-Chair, Law Society of NSW Employment Law Committee, sworn and examined

ALI MOJTAHEDI, Chair, Law Society of NSW Human Rights Committee, affirmed and examined

EMMA GOLLEDGE, Director, Kingsford Legal Centre, UNSW Sydney, affirmed and examined

BILL SWANNIE, Lecturer, College of Law and Justice, Victoria University, and member of the Australian Discrimination Law Experts Group, affirmed and examined

The CHAIR: Before we get started, I remind witnesses that Committee hearings are not to provide a forum for people to make adverse reflections about others under the protection of parliamentary privilege. I therefore request witnesses to focus on the issues raised by the inquiry's terms of reference and avoid naming individuals unnecessarily. Mr Swannie, would you like to make a short opening statement of no more than a few minutes?

Mr SWANNIE: Thank you, Chair. I am representing today the members of the Australian Discrimination Law Experts Group, which is a group of legal academics with expertise and experience in discrimination law and equality law and policy. We recommend that the Anti-Discrimination Amendment (Complaint Handling) Bill be rejected in its entirety. The bill is likely to have the effect of excluding many legitimate complaints. It seeks to require the president of the Anti-Discrimination Board to decline complaints in many circumstances and to prevent any complaint so declined from being heard by the NSW Civil and Administrative Tribunal.

The bill must be considered in the light of the purposes of the Anti-Discrimination Act. These purposes are, firstly, to protect the fundamental human right to live free from discrimination and, secondly, to provide remedies to people who have experienced various forms of discrimination. The Act currently provides rigorous mechanisms for identifying and removing weak complaints. These mechanisms are, firstly, the president's power to decline a complaint after investigation and, second, that leave is required when a declined complaint is referred to NCAT.

The Act is for the benefit of all members of society. However, the grounds of discrimination such as race, gender and disability mean that those who make a complaint are likely to experience one or more types of disadvantage, such as the inability to afford legal assistance and English being a second language. The complaint-handling aspects of the Act should not operate in a way that is likely to exclude these members of society. This would be contrary to the purposes of the Act. This would also be contrary to Australia's obligations under the International Covenant on Civil and Political Rights by effectively denying access to a remedy for discrimination.

We argue that the complaint-handling process must achieve two goals: It must operate fairly as between complainants and respondents and it must prevent misuse and wastage of public resources. We argue that the bill would unduly and unjustifiably restrict access to hearing determination remedies for people who experience unlawful discrimination. This is likely to further marginalise vulnerable members of society. We strongly recommend that the bill be rejected in its entirety.

The CHAIR: Mr Mojtahedi, would you care to make an opening statement for a couple of minutes?

Mr MOJTAHEDI: Chair, Mr Keats will make the opening on behalf of the Law Society.

The CHAIR: Okay, thank you. Ms Golledge?

Ms GOLLEDGE: Thank you to the Committee for your time. I am the director of Kingsford Legal Centre, which is a community legal centre in UNSW. We have a specialty in discrimination employment law and we provide discrimination law advice and representation to people across New South Wales. We have worked in this area for nearly 40 years. We represent people at the Anti-Discrimination Board and NCAT. In 2019 we provided [inaudible] 248 matters in all types of discrimination.

Kingsford Legal Centre is open to ways in which we can improve the operation of New South Wales discrimination laws but we do not support the bill in its entirety. The bill proposes a major change to the accessibility of discrimination law in New South Wales without sufficient evidence that it is currently required. Overall we are concerned that the effect of the bill is to reduce access to discrimination remedies and we do not think that is desirable. We need to remember the human rights basis of the legislation and the Act's intention, which should be given a beneficial approach, and that groups that are most likely to experience discrimination often face significant barriers articulating their complaint on the first occasion.

We believe [inaudible] experience discrimination, Aboriginal people, culturally and linguistically diverse groups, people with a disability or who experience mental illness or who have low literacy need access to accessible discrimination law remedies. Discrimination law in New South Wales is by no means perfect but it does offer these groups a relatively accessible way of bringing a complaint. We should do more to reduce the legal complexity and increase access to discrimination law remedies but this bill moves us further away from that objective. We should not be raising the bar and making it harder to bring an initial complaint. This reduces access to discrimination law remedies and is not what an open and democratic society should aspire to.

In our view there is not significant evidence to suggest that there is an issue with the exercise of discretion by the president of the ADB. We need to expect within [inaudible] system there will be a spectrum of complaints from the very meritorious to the vexatious. We do not support the widening of section 89B and think it presents very practical problems as to how it can be properly exercised. We think making it harder for complaints to be accepted will undermine public confidence in discrimination law and the important public statement discrimination law makes in relation to the acceptability of racism, vilification and discrimination. This is undesirable and gives the tacit message that discrimination or discriminatory conduct is acceptable. We know of many meritorious complaints that this could have happened to, especially with [inaudible] in haste, without access to legal advice and assistance, which is often hard to come by. We support the current redress to NCAT. It provides for oversight and is balanced. We do not believe there is sufficient evidence of a need for such significant reforms and are concerned that these will significantly curtail access to justice for the very groups that discrimination law is designed to protect.

The CHAIR: Mr Keats, do you want to say a few words?

Mr KEATS: I thank you for the opportunity to provide evidence to this inquiry today. I appear in my capacity as the Co-Chair of the Law Society's Employment Law Committee. The Law Society of New South Wales represents over 30,000 member solicitors across New South Wales. The Law Society has concerns about a number of the provisions of the bill before the Committee. These concerns have been articulated in our written submission, which we assume has been read by the Committee. Our key concerns include limiting the discretionary powers of the president of the Anti-Discrimination Board to decline a complaint under sections 89B and 92 by substituting the word "may" for the word "must"; secondly, expanding the list of grounds on which the president would be required to decline a complaint under 89B, effectively raising the bar for complaints to be accepted; and thirdly, repealing section s93A of the Anti-Discrimination Act which requires the president to refer a complaint that has been declined if requested by a complainant.

As a matter of principle the Law Society considers that barriers to human rights protections in New South Wales should be not raised without a solid evidence base. We could not find any evidence that the New South Wales Anti-Discrimination Board is experiencing a surge in unmeritorious or spurious complaints that are compromising its ability to fulfil its statutory function in a timely fashion that would necessitate the amendments of the nature proposed in the bill. The Law Society is also of the view that access to the review of administrative decisions, in this case through a referral to NCAT, is an important component of access to justice and procedural fairness that is available currently to complainants.

The Hon. SHAOQUETT MOSELMANE: Mr Swannie, in your submission and in your opening remarks you have clearly indicated that you support the rejection of the proposed bill in its entirety. Are there any parts in the proposed bill that could be tweaked a little to address the concerns of what some suggest is the denial of human rights of respondents? We have heard that through the evidence of a number of witnesses, particularly from the Australian Christian Lobby, the Freedom for Faith group and the Anglican Church Diocese of Sydney. Is there room in any of the proposed bill to address those concerns, particularly concerns about the rights of respondents?

Mr SWANNIE: To answer your question, I do not think there is anything that can be salvaged from this particular bill. I was listening to the evidence of the witnesses who gave evidence before lunch and I heard that there were suggestions to go beyond this bill in terms of costs awards and things like that. But no, I do not think there is anything that can be tweaked. I think the bill is fundamentally misconceived and it could be described as punitive in terms of its approach and how difficult it makes it for complainants to proceed through the process. So to answer your question, no, I do not think there is anything that can be saved from this bill.

The Hon. SHAOQUETT MOSELMANE: There is obviously a concern there amongst the particularly religious based organisations about the human rights of respondents, particularly as you have seen in their submissions. I hope you may have seen their submissions. Is there a way of addressing those concerns at all that they see as their being targeted, perhaps, and their human rights denied for those particular respondents?

Mr SWANNIE: As I mentioned before, the board and the commission both have powers to dismiss complaints that are not meritorious. They both have quite robust powers to dismiss complaints at an early stage

which are misconceived. One thing which is possible is to improve education surrounding how discrimination law works so that complaints that are weak are not made in the first place so that there is greater awareness about how these laws operate. I think that is one way of dealing with this issue about misconceived complaints—a greater level of resources being put into education and awareness about how these rights operate. That could potentially prevent misconceived complaints from happening in the first place.

The Hon. SHAOQUETT MOSELMANE: In their arguments, particularly the various Christian lobby group and the faith groups, they are not really denying access to various groupings. There would be more [inaudible]. But in your submission on page 4 you say:

> … the Bill may be contrary to Australia's human rights obligations, by effectively denying access to a remedy for discrimination.

How does it deny access when there is no-one suggesting that access be denied to any particular group and what remedies for discrimination are you [inaudible]?

Mr SWANNIE: The bill would deny access through the processes that it sets in place. It would make it very difficult for a complaint to proceed through the Anti-Discrimination Board and particularly to proceed to the tribunal for hearing. So it sets up so many obstacles—and as I have mentioned before, there are already robust processes for weeding out unmeritorious complaints. The bill seeks to set up processes which add to that and in fact make it much more difficult, going far beyond even the Federal legislation in terms of requiring complaints to be terminated at a very early stage and on a range of grounds. We would argue that given the cohort of people who are meant to enjoy the protection of anti-discrimination law and given the fact that they will often not have access to legal advice, they may have difficulties in terms of expressing themselves clearly in their complaint, the bill would effectively deny them access to a remedy through the anti-discrimination law.

The Hon. SHAOQUETT MOSELMANE: Ms Golledge, you mentioned raising the bar. Those who argued before you say they are not raising the bar; they are really making the process more efficient. Can you respond to that claim?

Ms GOLLEDGE: Firstly I think we are open to a view about increased efficiency but I do not think this bill achieves that. What it does is it gets rid of a whole lot of complaints that may or may not be valid at the first hurdle, without proper consideration as to whether it could be discrimination law. So it effectively makes it much harder for someone to bring a complaint. Discrimination law is extremely complicated, so it would mean that if someone did not properly identify, for example, the reason why they thought they were unfairly, the complaint could be terminated under 89B. I think section 92 provides really good redress [inaudible] the concern about the respondent's role is raised but section 92 does allow a respondent to really properly argue that this is misconceived, it is lacking in substance. [Inaudible] in my practice I see that all the time.

We also need to remember, and some of the respondents that you talk about there are actually well-resourced respondents who have access to legal advice and assistance, and complainants do not. So it is an opportunity for someone to examine and have an opportunity to fully explain their complaint. It is also an indication that often the reason for the discriminatory conduct is not within the complainant's knowledge or they do not have access to that information. It is crucial that the anti-discrimination [inaudible] has a role in flushing that out. So I am all for efficiency but not when we are sweeping discriminatory conduct under the table. We will not even get a sense of what is happening in New South Wales. We will not get proper accountability because of the provisions of 89B. Section 92 provides [inaudible]. I am all for increasing access to legal services for organisations and for respondents to properly respond using section 92. I do not think shutting the door on all complaints through 89B is the way to go.

The Hon. SHAOQUETT MOSELMANE: In your submission on page 2, point 4, you say you want to make discrimination law tests simpler, the law is already pretty simple. How do you propose to formulate that process?

Ms GOLLEDGE: About eight years ago we worked for a long time thinking about what is called a unified test in discrimination. Currently we have complex direct and indirect tests which make it very difficult for people to articulate the basis. So there is lots of evidence that a "but for" test or a way of linking the unlawful conduct with an attribute is the way to go. We have lots of complainants who do complaints who can talk for a long time, "I think I was treated unfairly for these reasons," but because they do not frame it within the confines of the Act or do not properly address the attribute it falls by the wayside. So we think there is an opportunity to think about making discrimination law more accessible. We do a lot of education in that space to talk about—to pick up that earlier point by the other witness. But it is a very, very difficult test and also there is lots of complexity because across State and Federal jurisdictions there are different tests for people. So we would be looking at a unified test of discrimination that does not have this complex direct and indirect and trying to harmonise and remove a lot of the exceptions and exemptions.

The Hon. SHAOQUETT MOSELMANE: If you could share that material with us, that would be appreciated.

Ms GOLLEDGE: Yes, by all means.

The Hon. SHAOQUETT MOSELMANE: Thank you.

The Hon. ROSE JACKSON: Ms Golledge, the people that you are working with to access remedies under the Act are in some ways already more advantaged than other cohorts because at least they are interfacing with your organisation. I wanted you to talk a little bit about just how hard it is for some people who have experienced discrimination, are in disadvantaged groups, to actually even come to the point of beginning to formulate the basis of a complaint and working with you to do that—some of those really initial barriers that people face to even coming forward and talking about their experiences of discrimination.

Ms GOLLEDGE: One thing we need to think about is not to undermine [inaudible] years of discrimination law work. So in particular in relation to Aboriginal people we might have Aboriginal people come to us and say, "I don't think there's any point in bringing a discrimination complaint because it's part of my everyday experience." And actually what this bill does in setting up 89B is it gets rid of those complaints at the initial stage if people cannot properly articulate it. So for people who do not have access to legal services, for people who are experiencing systemic discrimination every day, there are huge barriers here because this is a public message that also says discrimination in human rights is not important, that it is not worth even investigating and the body in New South Wales in charge of protecting human rights is not even going to look into this incident. What sort of message does that send to our communities? What does that say about the society that we live in?

And you are right, we do a lot of education, because for some people, really sadly, discrimination is part of everyday life and they do not want a legal redress for it. Far from the kind of perception that this is a way to get compensation, almost overwhelmingly the outcome people want in discrimination law matters are non-monetary outcomes. We must remember this whole idea about unnecessary litigation—the great value of the ADB and the discrimination system in New South Wales is its conciliatory approach where both parties can sit together and work on a road map together. That can be education in an employment context. It could be just the ability to talk about the experience. It is the ability to get a genuine apology. So there is lots of really good work that goes on behind closed doors at the ADB and I think a lot of that is lost in this focus around litigation, vexatious and unmeritorious complaints.

The Hon. ROSE JACKSON: I suppose one element that has been discussed in the change from the discretionary nature of 89B is the 12-month cut-off. The president currently has some discretion around that. Evidence has been received that requiring the dismissal of complaints where the incident has occurred 12 months prior would act as a disincentive and that there are in fact a number of reasons why someone may be [inaudible] to make a complaint very quickly after that experience of discrimination. I think my time is finished but if you could briefly talk about specifically some of the reasons people might not make an immediate complaint about discrimination.

Ms GOLLEDGE: Yes. I think there are lots of really valid reasons. For a lot of people they try to informally work things out, they try to resolve things. Particularly in employment it is a really big call to try to make that complaint. People use informal and internal mechanisms and I think we want to encourage people to do that. It also takes a long time to access legal advice or to seek counsel where someone says, "Oh, this might be something you need to do something about." In our experience there is often also a triggering event. Sometimes people put up—for example, the situation of someone dealing with sexual harassment. They kind of deal with it and then there is an incident or something that escalates it that means that they have to really have no choice. It might mean that they resign or are sacked.

We see that the ADB shows good discretion in how they operate in the 12 months. It is a balancing of procedural fairness. We do not see a lot of complaints that go back a very long way. We talk to complainants and say, "There's not enough evidence. It has gone on too long." It goes to the merit of the complaint. But there needs to be flexibility because we also want people to use informal mechanisms. If they have a complaint against an educational institution we want them to use those mechanisms. In the end that has less of an impact on the ADB and it allows those institutions to properly respond as well. So there are lots of valid reasons and some of them are for psychological and trauma reasons as well in relation to reporting serious incidents such as sexual harassment at work.

The Hon. TREVOR KHAN: Ms Golledge, we were provided with some statistics this morning in a tabulated form by Dr Michael Stead. I do not know if you saw any of his evidence this morning. They were statistics going back from 2014 through to the current time which showed or may have shown that there has been a decline in the number of complaints that were dismissed or declined right at the start under 89B due to there not

being a contravention. The figures that were presented showed a decline of about 50 per cent from 18.7 per cent down to 9.1 per cent and also in terms of declined after investigation under 92 from 9.8 per cent down to 5.3 per cent. I am wondering whether you have seen any change in practice before the board in terms of how they have been handling complaints. I am not entirely convinced by the statistics, I might just add. I am just interested as to whether you have seen any change in practice or procedures by the board over the last five years or so.

Ms GOLLEDGE: I could not comment specifically on the statistics. I would say that we work quite closely with the board for unrepresented complainants who have poorly constructed complaints to go and get legal advice. And so sometimes complaints are accepted, they are being considered under section 92 and the complainant is referred to us. We still see quite a few people who have had a section 92 termination. It is hard for me—because a lot of our experience, without looking at our statistics—to really comment on that except to say 89B is quite a strong power. So you would need to be quite convinced that there was nothing there. What the ADB does in its investigative process is it often tries to get some of that evidence that might establish that the complaint is lacking in substance. Whether the powers of investigation are being [inaudible] I am not sure.

The Hon. TREVOR KHAN: Section 46PH of the Australian Human Rights Commission Act has been referred to in various of the evidence, as have the amendments that were made there with regard to essentially vexatious or insubstantial claims. I am putting this up essentially not in favour of what Mr Latham has posited as a proposition, but why would not an amendment that implemented in a similar way a mandatory power to decline an application similar to 46PH be appropriate?

Ms GOLLEDGE: Because fundamentally there is not sufficient evidence, I do not think, that the anti-discrimination system is not working appropriately. And I think section 92 is a good catch-all.

The Hon. TREVOR KHAN: Can I just stop you there?

Ms GOLLEDGE: Yes.

The Hon. TREVOR KHAN: Let's say that is a policy decision that lawyers have to make all the time. Like the number of committees I have sat on, including into bills that I have sought to implement, I will always get people who come and say, "There is not sufficient evidence to do X or Y." Frankly, the Law Society every time it comes before an inquiry will just about run the line that there is no need for a piece of legislation that is being passed. What I want to know is: What is the downside in terms of impact upon your client base, for instance, of implementing a 46PH provision?

Ms GOLLEDGE: I do not have that section in front of me so I might just have to take that on notice. I do not know if anyone else can comment on that.

The Hon. TREVOR KHAN: Mr Swannie?

Mr SWANNIE: An important point to know about section 46PH is that it has a very different effect than the effect of this bill.

The Hon. TREVOR KHAN: I am not asking you to talk about this bill. I am asking you to, in a sense, address why 46PH being implemented would not be appropriate. I am trying to put Mr Latham's bill to one side, with the greatest of respect to him.

Mr SWANNIE: Your question is whether there is an argument for mandatory determination of vexatious—

The Hon. TREVOR KHAN: And completely insubstantial complaints—yes.

Mr SWANNIE: It comes back to that issue about many people who seek to make a complaint under anti-discrimination law may not articulate their complaint very well in the first instance. To make it easier to decline or terminate a complaint on the grounds that it is vexatious or misconceived is potentially making it more difficult for a possibly valid complaint to proceed. That would be the argument against mandatory termination. At the Federal level it can still go to a hearing even if it is terminated for being vexatious but this bill would be the end of the complaint—it could proceed no further if it was declined on that basis.

The Hon. TREVOR KHAN: Again I am trying to, with the greatest respect to Mr Latham, put aside his bill and just see. There seems to me if there has been an implementation of something like at the Federal level I am wondering why there is not an argument for a similar or [inaudible] approach at a State level. That is essentially what I am inquiring about.

Mr SWANNIE: There would have to be the possibility for that decision to be reviewed. I think that is the main point. If it was to be mandatory termination it would still need to be reviewed. It would still need to possibly go to a hearing at either a tribunal level or at a court level, because there is the possibility of the board

dismissing a complaint when it does have merit and there needs to be the possibility of it being reviewed later on. That is the response I would make to that question.

The Hon. TREVOR KHAN: Thank you very much.

The Hon. MARK LATHAM: Ms Golledge, in evidence earlier you said that my bill would be shutting the door on all complaints under section 89B. Given that the wording in the bill is very similar to the Queensland jurisdiction, how do you explain that the Queensland Human Rights Commission last financial year had 560 accepted complaints, about the same number per capita as New South Wales?

Ms GOLLEDGE: I do not practice in Queensland so I am not able to comment on that. I am just making an observation that in broadening section 89B so significantly it is making it more difficult to bring a discrimination law complaint. In my experience many complaints are not perfectly conceived at the complaint stage and we should understand and expect that. The legislation should allow space for complainants to have access to legal advice to remedy their complaint and for the ADB to investigate to unearth some of the evidence that would support that complaint.

The Hon. MARK LATHAM: So you have no evidence of how the wording of such a statute is operating in Queensland. Can I then ask: Have you seen any data about the extent of serial vexatious complainants in the New South Wales system?

Ms GOLLEDGE: I am not here and I do not have evidence in relation to vexatious complainants except to say that I think the way in which section 92 and section 89B work shows that the president exercises their discretion under those quite a lot. And so overall, yes, there are going to be people at either end of the system that want to use this a lot but I do not think we can create an amendment around those provisions because it has an impact on the majority, in which that it denies the main people who need to access discrimination law remedy. That is the problem in the sense that the intention of the bill is to deal with people at the fringes and it impacts on access to justice for the majority.

The Hon. MARK LATHAM: If you have not seen that data how would you say that there is no problem and there is no need for legislative amendment?

Ms GOLLEDGE: My understanding is that under section 89B and section 92 the ADB use that in about [inaudible] per cent of cases.

The Hon. MARK LATHAM: On page 2 of your submission you say that in 2019 you gave nearly 250 discrimination law advices. Earlier in your evidence you said you were involved in the lodgement of 150 complaints. In that vast amount of cases and complaints, how many times did the president of the Anti-Discrimination Board exercise her role under section 88A?

Ms GOLLEDGE: We do not keep that kind of data and I am not here to talk about specific cases—

The Hon. MARK LATHAM: No, I am not asking for specifics; I am asking about the overall number. Are you aware of the president in any of that vast number of cases exercising her role under section 88A?

Ms GOLLEDGE: Section 88A?

The Hon. MARK LATHAM: Yes.

Ms GOLLEDGE: I cannot comment on that. Just to correct you, I did not say that we represented in 150 cases. Also, the way in which Community Legal Centres collect their data is not on that basis. The best source of data in relation to what the ADB does and how it exercises its discretion would be its annual report.

The Hon. MARK LATHAM: In all of your involvement with this process in New South Wales are you aware of a single case where the president exercised her role under section 88A?

Ms GOLLEDGE: I could not say off the top of my head, so I am going to decline to answer.

The Hon. MARK LATHAM: Would you think in getting a handle on the nature of complaints it would be wise for the president to exercise her role under section 88A, which reads, "The president may assist the person to make a complaint"? In the process of assisting people to make complaints I would expect one of two things would happen: first, that the complaint could be improved on behalf of a vulnerable person or an unrepresented person; second, that the president would gather obvious information that the complaint might be vexatious, frivolous or lacking in substance and then, using the powers that my bill would confer, could rule out such a complaint, having been through the section 88A process.

Ms GOLLEDGE: My understanding in relation to that is that the ADB is not able to give legal advice to the complainant. My understanding is that there is an assisted process if someone calls up to lodge a complaint.

But if that person then wrongly frames their complaint the ADB is not a position to say, "Well, actually, that is not a protected attribute." It is my understanding that that would be [inaudible] problem and that that could still be caught by section 89B. That is the distinction between independent legal advice and the role of ADB in accepting complaints. I am not sure that that is an appropriate function. I think having more access legal advice is really critical—independent advice from the ADB.

The Hon. MARK LATHAM: Do you find it surprising that in an extensive submission from Anti-Discrimination NSW it did not provide any data at all to this Committee about what is happening under section 88A? Do you think the commonsense logic would be to try to help people who have an inadequate or poorly made out complaint or to make an assessment at the initial stage that the complaint should not proceed because it is frivolous, vexatious or lacking in substance and all the other things that I have put in my bill?

Ms GOLLEDGE: I could not comment on their evidence. I would just say that the ADB does operate quite well within its intention and does try to refer people to independent legal advice when they need assistance. The problem with broadening the provision of section 89B is that—you are right, if there is not something that helps people in terms of their complaint in terms of getting legal advice or properly framing it then they would be caught by 89B. It is a question of how we achieve that. I think that because of the way discrimination law operates and the need to offer people [inaudible] lodge very quickly, we need to have a mechanism that is not so harsh in relation to deficiencies. I understand where you are going with the intention of the bill but I think it is going to catch a lot of people who have legitimate complaints. There is more work that could be done to not do that. That is why section 92 is an effective mechanism in terms of providing that discretion.

The Hon. MARK LATHAM: I had a look at Queensland and they do not have any of those problems so I proceeded.

Mr DAVID SHOEBRIDGE: Thank you for your assistance in your submissions and your evidence today. Before the break we heard some evidence from a number of witnesses and I was asking them questions about how section 89B and the proposed additional mandatory measures to strike out proceedings would work. Their evidence was that, for example, with the provision that would make it mandatory for a claim to be struck out if the president was of the opinion that there was another more appropriate remedy that should be pursued in relation to the complaint or part of the complaint, the president would not need to undertake any investigations and would not need to obtain any legal advice but could just use that power to dismiss an action without doing a legal assessment of other remedies. How would you understand that that provision would work in practice if it was made law? Does anyone know?

Ms GOLLEDGE: Was that directed at me?

Mr DAVID SHOEBRIDGE: I was going to give you a break, Ms Golledge. It can go to any one of the other witnesses, but you are welcome to jump in if you like. Mr Keats or Mr Swannie?

Mr KEATS: I think it is problematic if you are going to form an opinion. If you have got an office holder like the president of the ADB forming an opinion it needs to have a proper basis to it, otherwise you have administrative decisions being made in circumstances where they could arguably be capricious and need to be challenged in a more expensive jurisdiction like the Supreme Court. There needs to be something more than an off-the-cuff view formed for the opinion of the president. A proper inquiry with a proper basis needs to be formed to reach the point of view that it could be struck out.

Mr DAVID SHOEBRIDGE: Mr Swannie, do you think the vibe would do it?

Mr SWANNIE: It does seem to be a very discretionary decision to say, "In the opinion of the president there is a more appropriate forum or place for the dispute to be resolved." To require that it be mandatory to decline on that ground does not seem to be appropriate at all. I know in the Federal legislation that is a discretionary decision that can be made to terminate on that ground. It does not seem to be a suitable method to deal with that ground to decline a complaint.

Mr DAVID SHOEBRIDGE: Ms Golledge, I am sorry to go back to you, but in your experience how does the investigation process work? We have had some submissions that complain that respondents are not put on notice the moment an investigation is started and others have said it is good that they are not put on notice every time an investigation starts because the investigation may not end up troubling them because the complaint may be dismissed. How do you understand that investigation process, at least from your side?

Ms GOLLEDGE: Investigation probably makes it sound like it is quite inquisitorial. It is really starting a paper trail and a procedural fairness process. The ADB will acknowledge the complaint, go back to the complainant and ask for more information—"You were dismissed on this date, why do you think this happened?" Then they will provide an opportunity and go to the respondent. They may ask specific questions of the respondent

such as, "Can you tell me the basis for that decision" or, "what sort of material went into this?" There is a kind of toing and froing on the paperwork—narrowing the scope of the complaint; clarifying the issues. In some cases the complainant might not have the information that goes to the discriminatory conduct. That investigation stage is really important if we think about other jurisdictions.

For example, in the fair work jurisdiction for discrimination there is a reverse onus because if I go for a job and I think I have been denied it on discriminatory grounds the employer is going to have a lot of the information—"Here is who I interviewed; here is my merit selection", and that kind of thing. The investigation process is critical to make some decisions about whether something is lacking in substance or misconceived. It is basically a procedural fairness process on the paperwork and it gives the opportunity to narrow the scope.

It is helpful to say to the complainant, "Narrow the time period and narrow the issues in terms of what is actually covered by the jurisdiction." Also, some protected attributes will not be covered in New South Wales. It also increases the likelihood of a settlement and the effectiveness of a conciliation. The parties may decide to be talking and thinking about outcomes. It might not ever go to a formal conciliation process. But I would certainly say that the investigative powers actually save the State a lot of money in trying to flush things out and clarify. That is the real value of section 92. You do not get that benefit under section 89B. You do not get that process. I know Mr Latham was talking about that section 88 provision, but currently that does not operate in [inaudible]. In fact, we have lots of [inaudible], so we need to be realistic about the extent to which the ADB is able to provide legal advice to complainants and whether that is appropriate.

Just on the other alternate remedy issue, one of the issues here is the complexity. If I have been sexually harassed at work I might have been assaulted, I might have a workers compensation claim, I might have a claim in the [inaudible] and I might have a discrimination complaint. I do not think is appropriate for the president to say, "Well I actually think you should be pursuing the workers compensation claim; not a discrimination complaint." We did some research a couple of years ago about why people, especially vulnerable people, want discrimination complaints investigated. The ADB's conciliation processes came out really strongly because people have an opportunity to talk about their experience and really have their voice heard in that conciliatory process. We need to remember that by and large this is not a litigious process. Some of the issues connected with this bill are very exceptional in terms of the vast majority of cases that go through the ADB.

Mr DAVID SHOEBRIDGE: I have one final question for Mr Keats. You come from an employment law background. Given the multiplicity of potential remedies and different claims that may be on foot if someone has a discrimination claim in the context of an employment perspective, how important do you think section 88B in its current terms is to ensure that people's remedies are not [inaudible]?

Mr KEATS: I think it is very important that these complaints are not automatically terminated. It is always a very difficult question as to which remedy to choose. There are always concerns that there could be other issues. For example, if there was an injury and there was discrimination there can be issues about whether the receipt of the money for the discrimination case will then prevent the injury case from happening and act as a common law settlement of a workers compensation case under that legislation. There is a whole series of questions that need to be thought out very carefully before you stop a person proceeding on one complaint and direct them to go somewhere else. There may be some consequences that the person wanted to avoided by starting the claim with the ADB.

Mr DAVID SHOEBRIDGE: So having the president second guess what the most appropriate remedy is without a thorough investigation is a very precarious path to say the least, given the complexity?

Mr KEATS: It is not appropriate.

The CHAIR: That is the end of the questioning. I thank all the witnesses for coming. That closes the hearing for the day.

(The witnesses withdrew.)

The Committee adjourned at 13:47.