Resolved to be published by the Committee on 18 August 2020

IN-CAMERA **PROCEEDINGS BEFORE**

PORTFOLIO COMMITTEE NO. 5 - LEGAL AFFAIRS

ANTI-DISCRIMINATION AMENDMENT (COMPLAINT HANDLING) BILL 2020

CORRECTED

Virtual hearing via videoconfernece on Tuesday 18 August 2020

The Committee met at 9:30.

PRESENT

The Hon. Robert Borsak (Chair)

The Hon. Mark Buttigieg
The Hon. Rose Jackson
The Hon. Trevor Khan
The Hon. Mark Latham
Mr David Shoebridge (Deputy Chair)
The Hon. Natalie Ward

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The CHAIR: Welcome to the in-camera 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 Aboriginals present. Today we will be hearing from Dr Annabelle Bennett, President of the Anti-Discrimination Board. Before we commence, I would like to make some brief comments about the procedures for today's hearing.

Please note that, as this is an in-camera hearing, witnesses are bound by the confidentiality of today's proceedings. Please be aware that the Committee has the power to publish today's evidence if it chooses. The Committee's decision will take into account the confidentiality and the sensitivity of the matters discussed. Should the Committee desire to publish some or all of the transcript, the secretariat will consult with witnesses about what is to be published, taking into account their privacy. However, the decision as to what is or is not published rests with the Committee. It is important to remember that parliamentary privilege does not apply to what witnesses say outside of their evidence at the hearing, and so I urge them to be careful about any comments they make to the media or to others after they complete their evidence. Such comments would not be protected by parliamentary privilege if another person decides to take an action for defamation.

Like so many other things that 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.

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 documents to hand. In these circumstances, witnesses are advised that they can take a question on notice and provide an answer within seven days. I remind everyone here today that committee hearings are not intended to provide a forum for people to make adverse reflections about 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 please mute their microphones when they are not speaking to minimise background noise.

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Evidence in camera by **ANNABELLE BENNETT,** President, Anti-Discrimination Board NSW, on former oath

The CHAIR: Would you like to start by making a short statement? Please keep it to no more than a couple of minutes.

Dr BENNETT: I made a statement on my last occasion and, apart from reiterating the matters that I expressed there, I do not think that there is a need for me to make another unless you want me to.

The CHAIR: It is purely up to you. That is fine.

Dr BENNETT: I think I emphasised a couple of matters there, and in particular the discretion and the stages of the way the complaints system is handled now. I do not think I need to revisit it except to re-emphasise the points I made there. I am assuming that everyone has access to that statement.

The CHAIR: They do. We will go straight to questioning.

The Hon. MARK LATHAM: I was just wondering, Dr Bennett, is there any more information supplementary to the material that was admitted under question 3 from Ms Abigail Boyd? Do you have any statistics for how many complainants are repeat complainants? That information seems to indicate, over the last five financial years listed, that there are around 20, perhaps 25 per annum.

Dr BENNETT: You did ask how many complainants for the last seven years have lodged more than five, 10 or 20 complaints. I can tell you that in 2012-13, 22 complainants lodged more than five complaints, two complainants lodged more than 10 complaints and one complainant lodged more than 20 complaints. In 2013-14, 21 complainants lodged more than five complaints, four lodged more than 10 and none lodged more than 20. In 2014-15, 22 complainants lodged more than five complaints, one complainant lodged more than 10 and

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one lodged more than 20. In 2015-16, 18 complainants lodged more than five, four lodged more than 10 and one lodged more than 20. In 2016-17, 18 lodged more than five, four lodged more than 10 and no-one lodged more than 20. In 2017-18, 29 complainants lodged more than five, three lodged more than 10 and none lodged more than 20. In 2018-19, 23 complainants lodged more than five complaints, seven lodged more than 10 and one lodged more than 20.

I should add that in looking at those numbers, if there are multiple respondents, we tend to divide those up as individual complaints. We can only go with our statistics, but in some cases it might have been a complainant lodging against five respondents. That would have been filed as five separate complaints even though in effect it was one complaint against a group of respondents. We have not broken those down to all of the individual complainants. You did not ask me just now but I can come back to the subject matter of those, the grounds on which those complaints were lodged. That was in your original question. Did you want me to answer that?

Mr DAVID SHOEBRIDGE: Sorry, just for the record, what has been read out supports one person having more than 20 complaints. I think it was 20 having more than five. Maybe you misspoke, Mr Latham.

Dr BENNETT: I think one did lodge more than 20 in normal years, but certainly in 2012-13, one did. But again, I cannot say at the moment whether that was 20 separate individual lodged complaints or complaints against a number of people. That makes it difficult but it might be helpful to know that, of the roughly over 1,100 complaints that add up in that area, they covered a range of grounds. Forty-seven were on the ground of age, 22 were carers' responsibilities, 134 were disability, four were HIV/AIDS vilification, 89 were homosexual vilification, 16 were homosexuality, 36 were on the grounds of marital status, 84 were race and 13 were racial vilification. Some others were non-statutory grounds or other unlawful acts. It covers, as you see, a range of the grounds that are available. I forgot to add 131 on the background of sex, 200 sexual harassment, eight transgender, four transgender vilification and 281 for victimisation. They are the statistics that have been drawn together from previous annual reports.

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We do not have a concept at the moment in the Act—and we are not against having one—of an ability to deal with a vexatious complainant. We can deal with vexatious complaints at the 92 stage, so we do have the power to deal with vexatious complaints and we can deal with those. A vexatious complainant is something that we do not have the power to deal with. That would be a matter for Parliament to introduce the concept at either stage of our proceedings—that is, the first acceptance stage and then the investigation stage—for something that could or would cover that off. I do point out, however—and again, this is not my ADB hat—that the question of holding somebody to be a vexatious complainant is a very, very high [inaudible] world. I know; I have had to deal with cases in my own past where such allegations have been made, both as counsel and as a judge. It is a big thing in our system and the legal [inaudible] is very high for that because we do have a concept of open availability of justice. So certain [inaudible] but it is going to be too high a test.

The Hon. ROSE JACKSON: As I recall, Dr Bennett, there was some evidence presented by you, when you appeared before us previously, about some open-mindedness on your part to amendments in that space. It would be useful if you could talk a little more about what specifically that might look like. As I recall, it was a potential amendment to section 89B. As you talk about that, are there any other amendments that you or other staff at the board might be looking for or might have discussed to help deal with this? As you say, people who use the provisions of the law that the Parliament has established for their own personal or political agendas is a feature of all judicial systems in New South Wales. Has there been any discussion internally at the ADB about other

things that you might like Parliament to do or other ideas that you have had that you think would be genuinely helpful for the work that you are doing and for managing that issue?

Dr BENNETT:

As you would be aware, we have under section 92 the power to decline a complaint if it is frivolous, vexatious, misconceived or lacking in substance. Now, we do not have that at the 89B stage. Speaking for myself, I cannot see a problem. It would not hurt, in my view, if that power were given at that stage. Although, of course, it has to be discretionary because it is actually very difficult at the very early stage—to make such a decision just on receipt would be a very unusual matter. We do have power at section 92 and we do actually have that. You need to have that because you need a near-investigation to get to that. But as long as there is a discretion then it would not hurt.

The other thing that would not hurt would be, in my view, to have a reference—which we do not have—to a complainant. That is why I tried to emphasise the difference between a complaint—because individual complaints on their face can be absolutely valid. Do you know what I mean? You can look at them and you can say, "Forget who it is. This is a valid complaint." We do not have any power at the moment to deal with a vexatious complainant. That is one matter, but there is something else I would like to emphasise. One is that amendments have to be looked at holistically. I do not need to tell you this; you are the parliamentarian. Doing piecemeal amendments—again, speaking personally—I would urge against. That is directed to a perceived specific problem because the old adage is that hard facts make bad law.

To take one person or one issue and turn that into something that affects everybody in the State if you are going to make an amendment to an Act—believe me, with respect, I am not trying to tell you how to do your jobs. Speaking as a user of legislation, that could cause untold problems because this is beneficial legislation brought in for a wide variety of people, who have different grounds upon which they can make their complaints in different circumstances. It is very important that those complaints are permitted to be made, permitted to be analysed properly and received, and that we use the discretions that we have to sift through [inaudible] ones.

Sometimes, on their face, you never know. Not everyone frames their complaint [inaudible] and you have got to have that power to assess the complaint to give it proper consideration. Some people do not have a ground. They come along with a problem and they do not actually have a statutory ground and we have to decline those. But you have got to look at it and you have got to give people that fair opportunity to have their complaint assessed.

The Hon. NATALIE WARD: . Coming back to discretion and the terms of reference for this inquiry, apropos the proposed bill—which proposes to direct or constrain your discretion in that you must decline a complaint in the circumstances proposed—could you comment more about that and the importance of retaining the discretion being directed to you, that you must decline a complaint? Can you comment on the importance of retaining that discretion in your view?

Dr BENNETT: My view is that the maintenance of that discretion is crucial and of vital importance. I am so personally—and also as president of the board—against any concept of limiting that discretion, for a number of reasons. First I think discretion should be available in matters such as this, especially as we are dealing with [inaudible] and across the breadth of the community. To me, there is no sufficient evidence available that there is a general problem that needs to be addressed such that that discretion should be removed. The discretion is being appropriately exercised. I cannot see the argument against it. To the contrary I think limiting that discretion could do untold harm and have unintended consequences, which is exactly why one should not do it. The existing system works and I think that there would be a huge issue of unfairness to the broader community if that discretion were taken apart.

Bearing in mind that at the section 92 stage we have a very broad—both at the 89B and at the 92 stage there is that discretion and it is exercised. As told by the statistics, complaints are declined. It is not as if it is not exercised. Complaints are declined. I could give you examples where you would say, "Of course on a first pass you might see that it came within that frame, but it would be unfair and wrong not to exercise the discretion to allow that pass through the next stage, and at least to the stage where we can investigate." If you are going to bring a discretion at the very early stage then you are refusing the possibility of us being able to investigate it to exercise that discretion later. Sometimes these things are not apparent on the face because sometimes a person, as I said earlier, could just have mis-drafted it or misstated it. The examples are not beyond the need or the ability to set them out, whereas this one sort of case can be dealt with in other ways—this one sort of system that seems to be the raison d'être of these proposals.

The Hon. NATALIE WARD: You could almost argue that there might even be an argument for more discretion in the case where—this is deliberately a tribunal. It is not a court. It is designed to get these matters as far as possible out of courts. And so, that discretion is because you are not having lawyers drafting pleadings at the early stage. You are having people putting their claim in in a pretty simple way. Can you comment about that in your experience?

Dr BENNETT: First, with great respect, we are not even a tribunal. A tribunal suggests a decision-making process. That is a [inaudible] and we are a board. A board is designed to facilitate conciliations and to help resolve these matters for people, many of whom are not legally represented and who simply, as you said, just come up with a story where they feel that something has gone wrong. Often they do not even have a ground and we have to decline those, but there are specific cases where they need to be looked at. Look, the discretion is a discretion. There are ways in which you can give us factors that can be taken into account and that can be very helpful because one can use a statutory example of something that can be taken into account— for example, an abuse of process or contrary to public interest, not to mention some of the other ones, like vexatious. Those are all quite helpful for us to have in there as a guide, but the discretion must be at large.

The Hon. NATALIE WARD: My last question is just on that. No one doubts that it is no fun being on the receiving end of a vexatious complainant or somebody who has just got a lot of time on their hands and feels the need to avail themselves or otherwise keep the board busy. That is not a great thing to happen. But [inaudible] help afforded to defendants or respondents in meeting these claims—in assisting them to put forward a defence or a response to the claims in the same way that a complainant is assisted.

Dr BENNETT: Look, I can tell you that one of the very important cultures at the Anti-Discrimination Board—which Mr Latham may not agree with—but the fact is the culture of it is that we are absolutely neutral. Our clients, if you call them that, are both the applicants and the respondents. Sometimes, yes, applicants need to have the systems explained to them of what happens; so do respondents. Respondents are often not legally represented. If they are then their lawyers tend to have a better understanding. Ultimately we are trying to get the two parties together, if that is where it goes and we think we can, to conciliate.

That often means not helping but advising through the process and to the systems both to applicants and respondents. So, something that we feel is important we will refer people to possible [inaudible] for advice if we feel they need it. That is the sort of thing we may well do. We do not give advice but we can help people as to the

process if there is an availability [inaudible] if they feel that it is relevant. But we actually balance what we do between them. We do not make the case for the applicants. We do not make the case for the respondents because we are not making a decision. We are trying to resolve it.

The Hon. NATALIE WARD: Just very quickly, statistically I know we have had some numbers—forgive me if they have already been provided. Could we have some numbers on how many matters are conciliated and resolved and in what time frame, if we have not already? That is, of the number that are coming through your door—yes, there are [inaudible] and we went through those earlier. But do we have numbers on how quickly the number of complaints are turned around? Sorry—I have not re-read the material.

Dr BENNETT: So, there was some evidence about the speed at which it has happened and there is some evidence about how many are settled. I can say that as a general rule the statistics from the last five annual reports suggest that, for example, in—I will just give you 2018-19 or I can give you more. But in 2019, 12 per cent were declined before investigation, 19 per cent were settled at or after conciliation, 7.5 per cent were settled before conciliation, 14 per cent were referred to NCAT and 5 per cent were declined after investigation. I think that [inaudible]. I should also add: 18.8 per cent were withdrawn and 18.7 were abandoned. So, sometimes when people lodge complaints and they engage in our process they understand a bit more about what the process is. You will see a significant percentage are withdrawn or abandoned. That might be after they have been talking with us. It might be after there has been an initial engagement in response from a respondent. Does that answer your question?

The Hon. NATALIE WARD: Yes, it does. Thank you.

The CHAIR: Ms Bennett, what criteria are used by, for example, yourself as president to determine whether a complainant is in fact a vexatious complainant or a person that is a serial offender when it comes to using the system?

Dr BENNETT: First, I am sorry to say we do not actually assess that because we have no powers with respect to a complainant. That is the point. What we do have powers to do, and what we do do, is that—under section 92 we have power where we see that the complaint or part of the complaint is frivolous, vexatious, misconceived or lacking in substance, or it is not in the public interest to take it further, inter alia. We can decline the complaint. At the moment we do not have power—we do not consider what the complainant is other than to the extent that it may reflect upon whether the complaint itself is vexatious. I know that sounds like splitting hairs but that is all we are allowed to do at this stage. It may feed in, but we do not actually assess a complaint directly. But it may feed in. It certainly could be a factor that could feed into an assessment of whether the complaint or part of the complaint is vexatious or frivolous.

The CHAIR: You talked earlier about the level in the court of someone to be declared—obviously it is a very high rung to be declared a vexatious litigant. You are saying now that you have no ability at all to even consider an individual as a vexatious complainant. Is that your answer?

Dr BENNETT: That is correct.

The CHAIR: So, regardless of how many times a person makes complaints, it is purely on the basis of the relative merit of the complaint. Is that what you are saying?

Dr BENNETT: That is right. We have no powers at the moment to assess a complainant but it may be a factor that would feed into the assessment of a complaint. I am not going to speculate. You can think of lots of examples. If the person lodged five identical complaints against the same person or indeed a number of—if evidence was before us that that person had lodged an identical complaint against different people under different pseudonyms or matters such as that. If that came up then that would reflect upon the nature of the complaint itself. Yes, we have power to deal with it in that way but, as I said earlier, there is nothing in the Act that refers to a complainant, possibly because it is not that sort of Act. I do not know. That would have been Parliament in 1977.

But also because of the bar—I mean, it is a big call. It is a big call to say, as happens in the courts, that a person is forbidden from lodging in that court any other complaint, be it ever so valid. That is the decision you are making in a court when you declare somebody a vexatious litigant—that they are precluded from filing in that court. I can tell you from my own experience it does not always help because it is only that court. They can go to another court and start up there, as has happened in a case in my experience.

The CHAIR: There is only one Anti-Discrimination Board and the Anti-Discrimination Board is not a court. So, why would we expect such a high rung in terms of trying to determine whether an individual—I grant

and accept what you say, that you do not have the power to judge the individual. I think that is a key part of why we are here, to see whether some sort of power like that should be put in. In my view there is a lot of wasted time and resources of the board being used by people who are following a process of, in their own mind, personal vendetta or getting square—whatever you want to call it. It is a waste of the board's resources to pursue those processes simply because you have to be fair about accepting those complaints as a board. It seems to be an abuse of process that you do not seem to be able to deal with because of the individuals concerned. Does that make any sense you?

Dr BENNETT: I understand what you are saying. Can I break that down a little bit? It is a very complex issue, if I may put it this way. First, we do have power to take some matters into account when we are dealing with a complaint. Because there is an open-ended discretion, the discretion can take into account any matters that are raised and so we can raise those.

The Hon. TREVOR KHAN: As you are aware we have received great number of submissions. One of them is submission 22A, which you do not have to have read; I have got to tell you that. It made a number of suggestions both with regard to Mr Latham's bill and a number of other suggested amendments to the Act. There are only a couple I want to refer to in terms of what they propose but I will also raise one or two others. The first one relates to section 88 of the Act because it seems to me the area of contention has related to vilification complaints and 88 specifically sets down two criteria that a vilification complaint must meet. Obviously you are looking at it there.

Dr BENNETT: I have just got it open here. Go on.

The Hon. TREVOR KHAN: What has been suggested in 22A, putting aside issues of drafting, is that there should be a third criteria—or perhaps a first criteria—and that is that the complainant has suffered a detriment as a result of the asserted vilification. Can I tell you, I am somewhat attracted to that because it seems to me that vilification complaint—well, the Act is designed to protect people and provide an avenue for people who have suffered a detriment in the form of one of the nominated forms of discrimination. But by that very nature it means that the complainant will generally have suffered a detriment. The vilification circumstance seems to me to lead to an exercise where somebody can not have suffered a detriment but instead simply, in a sense, use the Act as a sword as opposed to a shield. I am wondering if the suggestion of the insertion of a requirement that the complainant have suffered a detriment has some merit?

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Dr BENNETT: Okay. I have not thought about this, so I only give you my immediate reaction. On one hand I would say that that is obviously a matter for Parliament to consider whether [inaudible]. The only thing that goes through my mind in my capacity as the president of the board—I understand what you are saying. I am just thinking of the ability to evaluate it on the part of the people who are receiving the complaint. To what extent would we need to ascertain the nature and extent of the detriment? It is a process issue that I would bring to bear. For example, a mental detriment is a detriment. A job loss might be, for example—an asserted job loss. That would involve other considerations. I am only thinking of the practical problems that we would deal with. It could include hurt. It could include humiliation or ridicule. This could be considered a detriment.

The Hon. TREVOR KHAN: I would accept that humiliation and ridicule would constitute a detriment. I suppose when it gets, however, to that general feeling of irritation, hurt—

Dr BENNETT: Yes—

The Hon. TREVOR KHAN: —would constitute a detriment of substance.

Dr BENNETT: There are two matters there, though, that I just want to—if I can complete. First of all, vilification would bring into account serious contempt, hatred and ridicule. But as a process matter—and I have not thought this through. It is just my personal immediate reaction. If it is a ground for rejection of a complaint that there is no detriment—I am just thinking about how one ascertains that and the practical difficulties of ascertaining that by us, if you see what I mean. It is a significant finding that would have to be made and it is not that straightforward. So, I cannot take it much further than that. I do not even think taking it on notice will particularly help. It is purely that practical consequence of doing it and the burden—not the burden on our people but the practical ability to come to those decisions if should be a ground for declining.

The Hon. TREVOR KHAN: Sure. Dr Bennett, could I do this with you? Could I now take you to 89A (2)—

Dr BENNETT: What?

The Hon. TREVOR KHAN: Sorry—89B (2).

Dr BENNETT: Yes.

The Hon. TREVOR KHAN: I just refer you to (2) (a) at the moment. That is that, at the present time, no part of the complaint complained of could amount to a contravention of a provision of this Act or the regulations. At the moment there is a discretion to decline a complaint because it does not meet that criteria. That is correct?

Dr BENNETT: Yes.

The Hon. TREVOR KHAN: And under 89B (3) it provides that the president is to give notice of the decision to accept or decline a complaint to the person who made the complaint and, if the respondent has given notice, to the respondent.

What I want to invite you to consider is, for instance, whether it be discretionary or otherwise, if we inserted into 89B (2) similar provisions to 92 with regards to vexatious, et cetera, that it would be appropriate under subsection 3 to make that provision that the president, having come to a view that it is appropriate to decline—that a complainant be given notice of the intention to decline with an invitation to the complainant either to amend the complaint or alternatively to make submissions as to why the view reached by the president is incorrect. That is a form of internal appeal process, if I can put it that way. Rather than, as it is rigged at the moment, there being an automatic, "You're out the door, blossom," it is essentially, "Well, we're probably going to shut the door on you but you might like to tidy up your complaint before we go any further." What do you think of that proposition?

Dr BENNETT: Okay. First, (2) (a) tends to be if there is no ground—for example, if someone is making a complaint and there simply is not a ground under the Act, so it is not possible that there is a complaint. Secondly, practically I think people who make complaints if there is an issue are given the opportunity—often they are just not in the correct forum. I think our inquiries people tend to say to them, "This is the problem with your complaint." They actually get that ability. My concern is—

The Hon. TREVOR KHAN: I do accept that that is likely to be the practical approach but I will come to why I raise this further in a sec.

Dr BENNETT: I think realistically people do get the opportunity to deal with the potential for defamation. Again, it is a matter of time and process. It is again part and parcel of the fact that it is a reasonably high bar, in a way, to cutting something off at that stage. And so, it is usually a yes/no answer and at some stage—sometimes you just do not give people more and more chances to make more and more cases. I do not know if there is a problem that needs to be addressed in practice. That would be one response. If there is no actual problem, why muddy the waters? It does require another round at the kitchen. I have not given thought to how much resource utilisation that would be or how that would work in practice, quite frankly, Mr Khan. I do not know if there is actually a problem there that needs to be addressed. What you are suggesting is that if we think a person does not have a ground we would have to notify them formally and give them a chance, before declining, to rewrite the complaint.

The Hon. TREVOR KHAN: Yes.

Dr BENNETT: I think it is a matter for you. It would mean another round at the kitchen for us. I have not thought, nor do I think I could anticipate, what the resource complexities would be. I guess part and parcel of the complexity would be that at the moment what is being done informally to ensure that people are not declined for no reason—that extra burden of having to go through a formal process could be more demanding of us. I suppose the question is—if it gives a complainant an opportunity to rectify the complaint to bring it within the grounds, then other factors would have to come into account.

I suppose you would then have to give procedural fairness to the respondent and notify the respondent what the original complaint was, which at the moment we do not have to do if the respondent has not been notified. If it was a draft complaint the respondent would have to be told—no, question mark. If we were going to decline a complaint as it did not meet ground A and we were obliged to give the complainant an opportunity to rectify it formally, would we then formally have to give notice to a potential respondent that this process had been gone through? I think if you are going to—

The Hon. TREVOR KHAN: Could I just answer that, Dr Bennett, in this way: It is a long time since I have practised and it was not in this jurisdiction in any way. I can give you my speech about the traffic court. But realistically if what one did was lodge a statement of claim—say, in the district court—and you received a requisition from the registrar that there was some defect, you may amend your statement of claim to rectify that. You are not obliged to serve the—I will call it the originating process. You are only obliged to serve the amended statement of claim. I saw it in that context.

Dr BENNETT: You are absolutely right, with great respect, that—yes. You are usually entitled in any court to amend your statement of claim once before—even without leave. That sort of thing can happen. I understand that. I think practically speaking people do get a chance, if they are told there is something wrong with their complaint, to rectify it. I am just thinking about the extra processes that would be in place if it was a formal matter—that we had to notify them formally and that sort of thing happened. I cannot really take it much further than that. In saying that, if you are going to bring that in, please take into consideration whether it has to be a formal process and how it would work. But I cannot really comment one way or the other.

The Hon. TREVOR KHAN: Dr Bennett, I do not want to hog the limelight so I will just one final question. It relates to 92 and particularly 92 (a) (i). If you look at 92 (a) (i) and 92 (a) (ii)—I am interested in the wording of 92 (a) (i) because it certainly talks in terms of "vexatious" and we have concentrated on the vexatious nature of matters, partly because of the background of this. But it also deals with "frivolous, misconceived or lacking in substance", which are far less of a barrier and are actually quite different in their nature. But if you look at (ii) it deals with conduct alleged that, if proven, would not disclose the contravention of a provision. I am wondering if you can identify with the differences between subclause (i) referring to "misconceived or lacking in substance" and subclause (ii)—conduct which essentially does not disclose the contravention. I am just wondering if what we have got involved in is pulling something out of another Act and sticking it in here and then cobbling something else together. It seems unusual drafting to me.

Dr BENNETT: Yes and no, with respect.

The Hon. TREVOR KHAN: You do not have to be that respectful.

The CHAIR: He does not get that very often.

Dr BENNETT: I am not trying to go through a statutory construction point here myself. Subclause (ii) is straightforward because that is that even if everything is there it is not a contravention. That can be because the ground was not there or any matter such as that. That is straightforward. The beauty of (i)—and that is why I am

going through this concept, if I can take you back, Mr Khan: ejusdem generis. You have got a composite expression there that has different components and you have got a discretion. If it were me I would not touch it because I think it gives the broadest discretion that something might not rise to be vexatious but it could be a combination. It could be frivolous.

These are just graduating concepts—and they are not unusual in legislative drafting—that enable the decision-maker to have a wide basis. It might not amount to vexatious but it could be misconceived in that it could be something that is not properly brought under the Act. It could lack substance in the nature of the complaint itself; that is, it could be a contravention. But there is not enough there to amount—there is a legal ground under B, sort of thing, but it just lacks sufficient substance. I cannot think now of examples of the top of my head. But quite frankly, as a person who is used to having to work with statutes, I would not touch it.

The Hon. TREVOR KHAN: Right. That answers the question. You are not assisted by breaking it down in any way.

Dr BENNETT: No.

The Hon. MARK BUTTIGIEG:

Do you have any suggestions as to what we may be able to include which would give enough discretion to the tribunal to judge whether or not the nature of the person or the motive therein could be dealt with as part of looking at it?

Dr BENNETT: Look—two matters, if I may raise it. I actually think that in a way 92 (1) (a), which is that the complaint or part of the complaint is frivolous, vexatious and not in the public interest—you have got the two aspects there in 92. So, because the nature of the complainant can feed into a characterisation of the complaint if you have evidence, for example, that that is a series of complaints of a similar kind—the discretions are very broad there. To some extent I think you can leave that as it is and it does give sufficient ability to deal with matters. The only other thing that you may wish to consider is whether or not you bring that in at the 89B stage because between 89B and 92 we have to undergo an investigation.

It does not mean it is mandated, because it is discretionary. Therefore I do not think it would hurt to bring that into 89B, to shore up the ability to decline it at the first stage if on the face of the complaint a view was taken that it was frivolous.

I cannot see personally that that would be a downside because there are discretions available. And if you wish to bring into the 92 stage a vexatious complainant—bearing in mind I would have to be very careful in applying that—it would have to be after investigation, I think. You cannot do that on the face of it.

If that was in 92 and it was perhaps made clear that you could take—at the moment it is "or". I have to get into statutory construction here and I will say this as a layman, if I may, not as the president of the board. If you took the fact that it is "or" and you actually added perhaps that it is quite clear that you can take one or more of those factors into account—at the moment they are not conjunctive. I do not want to make them conjunctive because that would lessen the discretion. You would have to prove all of them. But you could actually provide for the fact that you are entitled to take more than one of those into account. That could help, perhaps.

I would point out that while you are looking at 92, if you are going to insert it into 89B you would have to leave out "lacking in substance" because "lacking in substance" is not something on the face of the complaint. If you are going to bring 92 (1) (a) into 89B—that the complaint or part of the complaint is frivolous, vexatious or misconceived—once you bring in "lacking in substance" you require a determination. Are you with me? You cannot make that at the 89B stage. I cannot see a problem in bringing that into the earlier part on the face of a complaint. That certainly would give more power to the president to be able to deal with those matters, especially if you can take more than one factor into account while leaving them disjunctive—a provision that said, "The president may in his or her discretion take into account more than one of these factors."

The Hon. MARK BUTTIGIEG: Thank you. That was very helpful.

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The CHAIR: I think we will have to draw questioning to a close right now. Thank you very much, Dr Bennett, for coming today.

Mr DAVID SHOEBRIDGE: Could I just ask one? I have been trying to ask this one thing about "vexatious" for about 40 minutes. Is that okay?

The CHAIR: Please.

Mr DAVID SHOEBRIDGE: Dr Bennett, one of the options for dealing with vexatious complainants would be to use the existing architecture that already exists there in the Supreme Court, which has well-accepted checks and balances, and to give the president of the Anti-Discrimination Board a discretion to refer a complainant to the Supreme Court for a determination to be made at the Supreme Court. And then, if a determination is made at the Supreme Court using those tried and true standards, a matter could not proceed unless the president permitted it to proceed. It would have two potential benefits. One is that it would take that highly politicised determination away from the board and put it in a place where nobody has ever had a trouble with it being used. The second one—it would retain your discretion even after a determination had been made.

Dr BENNETT: Mr Shoebridge, I had not thought of that. That is fantastic. I think that also means that it is not left to the president to activate that decision. It makes it judicial, which makes it a much—applying the test. With great respect, I think it is inspired.

Mr DAVID SHOEBRIDGE: Well, I appreciate your answer. But it does—it takes the politics away [inaudible]. It has those benefits.

Dr BENNETT: I will withdraw my previous one, not because I do not want to be personally nice to you but because I think it is probably inappropriate. I do think that giving the president of the board the discretion to refer the matter to the Supreme Court of New South Wales to make a determination that that person is a vexatious complainant could well be an appropriate step to take because it maintains the checks and balances. It gives the president discretion. It also has an objective analysis. It is not the president being judge, jury and executioner either, if you know what I mean. Otherwise complaints could be made or assertions made that it was done by the president for internal purposes, not for external reasons, if I can call it that. I think a referral to an independent and impartial decision-maker such as the court is actually quite a useful check and balance to enable the board to have that ability and also to have an objective appraisal made of that situation. I would see that could be a very helpful solution.

The CHAIR: Okay. We have come to the end of our questioning today. Thank you very much, Dr Bennett, for attending. I note you took one question on notice.

Dr BENNETT: Oh, did I?

The CHAIR: I believe so. That is what I am advised. The Committee will be in contact with you—

Dr BENNETT: I am terribly sorry. I did not make any notes of any questions I took on notice.

The CHAIR: The secretariat will contact you in relation to that and advise what that was.

Dr BENNETT: Do we have seven days from the day on which we receive that notification?

The CHAIR: Yes.

Dr BENNETT: Thank you. I was worried about the time frame.

The CHAIR: No, that is fine. Thank you very much again. We will reconvene at 11:20.

Dr BENNETT: Thank you.

(The witness withdrew.)

(Short adjournment)