public interest
ADVOCACY CENTRE

Submission re Anti-Discrimination Amendment (Complaint Handling) Bill 2020

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Level 5, 175 Liverpool Street, Sydney NSW 2000
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

Contact

Alastair Lawrie
Public Interest Advocacy Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: (02) 8898 6515
E: alawrie@piac.asn.au

Website: www.piac.asn.au

Public Interest Advocacy Centre

@PIACnews

The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

1. Introduction and summary

The Public Interest Advocacy Centre has a long history of work on anti-discrimination issues, both nationally and in New South Wales.

We have acted on behalf of a number of complainants under the *Anti-Discrimination Act 1977* (NSW) ('the Act'), on a diverse range of subject matters. Our work has included complaints resolved through conciliation, that have progressed to the NSW Civil and Administrative Tribunal (NCAT), and which have been considered by the courts.

We also have significant experience in law reform in relation to both Commonwealth anti-discrimination law, and specifically about the *Anti-Discrimination Act*.

PIAC acknowledges the intention behind the Bill is to ensure that the Act operates fairly and efficiently and is not open to misuse. Unfortunately, the Bill's drafting is very broad and is likely to have the effect of excluding many legitimate complaints. In seeking to remove the discretion of the President in dealing with complaints and restricting access to NCAT for a determination of complaints, the Bill has significant implications for the rule of law.

The Act seeks to protect the fundamental human right to live without discrimination. It is important that its protections remain accessible to those who need it, especially people from communities that already face disadvantage.

PIAC therefore does not support the passage of this Bill.

Recommendation

That Parliament reject the Anti-Discrimination Amendment (Complaint Handling) Bill 2020.

There is, however, a strong case for a comprehensive review of the Act, including its provisions regarding the investigation, conciliation and determination of complaints. The Act is over 40 years' old and many of its provisions are out-dated and no longer fit for purpose. NSW deserves modern, best-practice laws to protect rights across the community.

PIAC is currently working in partnership with legal experts and a broad range of community organisations, to develop the evidence-base for comprehensive reform of the legislation.

2. Preventing Legitimate Complaints

PIAC's primary concern with the Bill is that it would have the effect of preventing legitimate complaints of unlawful discrimination from being considered by the President of Anti-Discrimination NSW ('the President'), and/or by NCAT.

2.1 Complaints in more than one jurisdiction

Schedule 1, clause 2 would omit section 88B of the Act. This provision currently states:

> (1) A person is not prevented from making a complaint under this Division only because the person has made a complaint or taken proceedings in relation to the same facts in another jurisdiction, whether in New South Wales or elsewhere.
>
> (2) The Tribunal must have regard to any such proceedings, and to the outcome of any such proceedings, in dealing with or determining the complaint.

The apparent of aim of removing of this provision, in conjunction with other changes proposed by the Bill, is to prevent people from lodging complaints in multiple jurisdictions in a manner that is intended to be oppressive.

Removing s 88B is, however, not the way to achieve this and may have unintended consequences.

Section 88B does not apply only to a person who may take proceedings in another State or Territory – it applies to other 'jurisdictions' such as tort law or workplace relations jurisdictions. There are a range of legitimate reasons why a person may bring proceedings in more than one jurisdiction to obtain a remedy for a range of harms caused by a discriminatory act. Before considering repeal of s 88B, significant consideration would need to be given to its broader impact on rights protection.

In any event, s 88B(2) already requires NCAT to have regard to complaints lodged elsewhere, including their outcome(s), in dealing with and determining a complaint. This will allow NCAT to ensure that any remedy ordered, such as compensation, does not overlap with any other proceedings.

NCAT is also able to take into account unreasonable conduct by a party when considering whether to order costs. Under s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW), NCAT also has the power to award costs where there are 'special circumstances'. What will constitute 'special circumstances' remains open, but relevantly the Tribunal may have regard to:

> (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law
> ….
> (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
> ….

This approach is preferable to seeking to prevent complaints being made in more than one jurisdiction arising from one set of facts.

Finally, we note that, on a practical level, removing s 88B is unlikely to influence whether the President is able to accept or decline a complaint, because they may not be aware of whether a complaint has been lodged elsewhere. Even if they suspect a case has been lodged in another jurisdiction, it is possible their equivalent anti-discrimination body would refuse to confirm or deny the existence of that complaint on the grounds of confidentiality.

2.2 Removing necessary discretion of the President of Anti-Discrimination NSW to accept or decline complaints

Clause 3 would significantly alter section 89B by removing the discretion of the President in determining whether a complaint is to be accepted or declined, in whole or in part: replacing 'may' with 'must'.

PIAC is not aware of evidence that the President has failed to properly exercise the discretion to decline complaints under this section. It is therefore not clear why it is necessary to remove that discretion.

It is also important to note that a decision to decline a complaint without investigation is not reviewable by NCAT, by operation of s 89B(4). This is a power that should therefore be used exceptionally sparingly as it bars a person from proceeding with their claim.

In PIAC's submission, it is important to retain the President's discretion. As the second reading speech for this Bill acknowledges, this legislation seeks to protect the rights of people experiencing discrimination and who may be significantly disadvantaged. It is therefore important that complaints processes retain enough flexibility to ensure that procedural and technical barriers do not prevent people having access to justice.

Having access to a remedy for a breach of rights is a fundamental component of the rule of law and itself a human right: see Art 2(3)(a) of the *International Covenant on Civil and Political Rights.*

Inflexible time limit would apply

If changed in this way, the law would have a particularly unjust operation for claims involving a course of conduct. If the President's discretion is removed, under section 89B(2)(b), the President would be required to decline a complaint if 'the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint.'

This would apply to a person complaining of a course of conduct over many years, to exclude all parts occurring more than 12 months before the complaint was made.[1] This is a radical change that would undermine the protection provided by the Act.

[1] Note that it appears likely that the President would only be required to decline those aspects of the complaint that took place earlier than 12 months before making the complaint by virtue of s 89B(1),

Consider a woman who has been subject to years of ongoing sexual harassment by an employer and has been fearful of making a complaint because they cannot afford to lose their job. When finally circumstances allow her to bring a complaint (or become so unbearable that 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.

This would be an unjust outcome. The proposed change would significantly reduce the ability of the Act to address discrimination involving a course of conduct and provide much less coverage than exists in other States and Territories or at the Commonwealth level.

2.3 Inserting new grounds compelling the President of Anti-Discrimination NSW to decline complaints

In addition to mandating that the President must decline complaints in relation to the existing grounds listed in section 89B(2)(a)-(e), the Bill would add a further seven new grounds which, if satisfied, would compel the President to reject complaints prior to investigation. As noted above, such a decision is not reviewable by NCAT, by operation of the existing s 89B(4).

PIAC is again concerned that these proposed provisions would have the practical effect of excluding legitimate complaints of discrimination. This undermines the rule of law and should be opposed. It is critical that a beneficial approach is taken to a regime that seeks to protect the rights of people experiencing disadvantage to ensure that it remains accessible. Ensuring that an effective and accessible remedy is available to people whose rights may have been violated is also required by the human rights standards that the Act seeks to uphold.

For this reason, PIAC urges Parliament to oppose the addition of new grounds to s 89B.

There are also a range of specific problems with the grounds that the Bill would add.

'Frivolous, vexatious, misconceived or lacking in substance'

Under proposed new s89B(2)(f), complaints must be declined if 'the President is of the opinion that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance.'

It is a radical step to oblige the President to summarily decline a complaint without investigation that is, in its initial form, misconceived or lacking in substance. This is particularly the case when the effect is to bar a complainant from further action.

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which refers to complaints be declined 'in whole or in part'. This is, however, something that would also need to be made explicit should this amendment be made.

Such an approach may particularly disadvantage people who have not had the benefit of legal or other advice prior to lodging a complaint and are unable to clearly articulate it.[2]

Declining other legitimate complaints

Proposed new sections 89B(2)(g), (h) and (i) may similarly have the practical effect of seeing otherwise legitimate complaints being automatically declined by the President.

In PIAC's view, it is inappropriate for broad factors such as whether there may be a 'more appropriate remedy', or that a complaint may be 'more effectively or conveniently dealt with' by another authority to be used as a basis for excluding complaints entirely before any investigation takes place.

Declining complaints against respondents in other jurisdictions

Proposed new section 89B(2)(j) provides that the President must decline a complaint where:

> one or more of the respondents is an individual who has made a public statement to which the complaint relates and, at the time of making the statement, was-
> (i) a resident of another State or Territory as evidence by the individual's address on the electoral roll, and
> (ii) not in New South Wales…

Proposed new section 89B(2A) further provides that '[f]or the purposes of excluding the application of subsection (2)(j), the onus of establishing that the respondent was in New South Wales lies with the complainant.'

PIAC does not support withdrawing protection for people in NSW for discrimination or vilification by way of public statements made outside NSW by non-residents of NSW.

This would have the practical effect of preventing legitimate complaints of vilification from being investigated: for example, if a public figure based outside NSW gives an interview to a NSW media outlet and makes statements that incite hatred towards members of a race of people living in a particular community in NSW, a person from that group would be unable to bring a claim against that public figure.

In circumstances where a person from the group that is vilified makes a complaint against multiple respondents, namely the media organisation that broadcast the vilification as well as the interstate public figure who made the comments, new section 89B(2)(j) would mean that the entire complaint must be declined.

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[2] Should this provision be retained, it should be made clear that a complaint that is misconceived (etc) only in part should only have *those parts* declined, rather than the complaint as a whole. It appears clear from s 89B(1) that the President is able to decline a complaint 'in part', but this should be clarified to ensure that complaints that may simply contain extraneous material at the outset of a complaint are not excluded entirely from investigation.

Declining complaints that fall within an exception

Proposed new section 89B(2)(k) provides that the President must decline a complaint where 'the complaint falls within an exception to the unlawful discrimination concerned.'

In PIAC's view, it is not appropriate that a decision about whether an exception applies is made at a preliminary stage, before further information is sought from the complainant and a response from the respondent.

The onus of proving that an exception applies ordinarily lies on a respondent.[3] This should not be subverted by having the issue determined before any investigation takes place.

This is particularly the case where the operation of exceptions may itself be unclear, such as the application of the general religious exception in section 56(d).[4] In litigation involving this exception, different arbiters have reached very different conclusions about its application,[5] highlighting the inappropriateness of having this as a mandatory ground for summarily dismissal of a complaint.

Declining complaints where the respondent has a cognitive impairment

Proposed new section 89B(2)(l) provides that the President must decline a complaint where 'the respondent has a cognitive impairment and it is reasonably expected that the cognitive impairment was a significant contributing factor to the conduct that is the subject of the complaint.'

Cognitive impairment is then defined in proposed new section 89B(6) as 'includes an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia or a brain injury.'

There are a number of problems with this proposed provision.

First, the *degree* of impairment that will bring a respondent within this provision is left undefined. Therefore, a mild impairment that has minimal impact upon a person's cognitive function would place a person entirely outside the scope of the Act. PIAC does not support such an approach.

Second, the President would be required to make this assessment prior to commencing an investigation and therefore prior to requiring information from the respondent. Upon

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3 Section 104.

4 'Nothing in this Act affects… any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.'

5 *OV & anor v QZ & anor (No. 2) [2008] NSWADT 115*
Members of the Board of the Wesley Mission Council v OW and OV [2009] NSWADTAP 5 (27 January 2009)
Members of the Board of the Wesley Mission Council v OV & OW (No. 2) [2009] NSWADTAP 57 (1 October 2009)
OV & OW v Members of the Board of the Wesley Council [2010] NSWCA 155 (6 July 2010)
OW & OV v Members of the Board of the Wesley Mission Council [2010] NSWADT 293 (10 December 2010)

what basis, therefore, would the President form a view as to what could be 'reasonably expected'?

2.4 Compelling the President to decline complaints during investigation

Under existing section 92 of the Act, the President is granted discretionary power to decline complaints at any stage of their investigation based on seven specific grounds, or where 'the President is satisfied that for any other reason no further action should be taken in respect of the complainant.'

However, schedule 1 clauses 6 and 7 of the Bill would remove this discretion (replacing 'may' with 'must'), compelling the President to decline these complaints.

PIAC is not aware of evidence that the President has failed to properly exercise the discretion to decline complaints under this section. It is therefore not clear why it is necessary to remove that discretion.

In the context of legislation that seeks to protect the human rights of potentially vulnerable and marginalised people, it is appropriate that the President retains a discretion in relation their handling of complaints.

2.5 Removal of ability for complainant to require President to refer complaint to NCAT

The Bill would also have the effect of removing the ability of complainants to require the President to refer complaints to NCAT for determination. For example, clause 11 would repeal section 93A of the Act, which currently provides that:

> (1) If the President has given a complainant a notice under 87B(4) or 92, the complainant may, within 21 days after the date on which the notice was given, require the President, by notice in writing, to refer the complaint to the Tribunal.
> (2) On receipt of a notice under subsection (1) from the complainant, the President is to refer the complaint to the Tribunal.

It is important to note that this does not provide an automatic right for complainants to have their matters considered by the Tribunal – section 96(1) already provides that a 'complaint that is referred to the Tribunal on the requirement of a complainant under section 93A(1) may not be the subject of proceedings before the Tribunal without the leave of the Tribunal.'[6]

In PIAC's view, the approach strikes an appropriate balance and should be retained.

On the other hand, the Bill would require a person who disagrees with a decision of the President to seek review of that decision under the *Administrative Decisions Review Act 1997* (NSW). This would be a much more complicated and time-consuming process that may result in a matter being remitted to the President before then being referred to the Tribunal in any event.

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6 Clause 13 repeals this provision.

3. The need for comprehensive reform

While highlighting our concerns with the proposed amendments, we recognise that there are a range of improvements that could be made to the operation of the *Anti-Discrimination Act 1977* (NSW) and its complaint-handling provisions.

The Act is now more than four decades old. It has not been the subject of independent review for over twenty years[7] and the recommendations of that review were largely not acted upon.

Some of the areas in which the Act needs modernisation include the following:

- The Act is also the only anti-discrimination law in the country that provides blanket exceptions to all private educational authorities, both religious and non-religious alike, permitting them to discriminate against students and staff in a wide range of ways on the basis of grounds including disability,[8] homosexuality,[9] sex[10] and transgender status.[11]

- The civil vilification protections in the Act – which cover only race, homosexuality, transgender status and HIV/AIDS status – are now inconsistent with the longer list of attributes which are covered by the (welcome) offence of publicly threatening or inciting violence in section 93Z of the *Crimes Act 1900* (NSW).[12]

- The Act contains the least coverage against discrimination for the lesbian, gay, bisexual, transgender and intersex (LGBTI) community of any jurisdiction in Australia. This is both because of out-dated terminology (the protected attribute of 'homosexuality' in Part 4C means bisexual people are not protected, while the definition of 'transgender'[13] in section 38A excludes people with non-binary gender identities) as well as the failure to cover sex characteristics (meaning intersex people are not protected, either).

- The Act also fails to include 'religious belief, or lack of belief' as a protected attribute, leaving NSW an outlier in protecting human rights.

These are just some of the many deficiencies in the current Act. It is why PIAC has been working with an advisory body of legal experts and relevant community organisations to consider what changes are needed to better protect people against discrimination and vilification across the State. We anticipate presenting the evidence-base for reform to Government and members of Parliament later this year.

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7 NSW Law Reform Commission, *Report 92: Review of the Anti-Discrimination Act 1977* (NSW), November 1999.
8 Section 49L(3)(a).
9 Section 49ZO(3).
10 Section 31A(3)(a).
11 Section 38K(3).
12 With section 93Z(1) covering all of race, religious belief or affiliation, sexual orientation, gender identity, intersex status and HIV or AIDS status.
13 'a person:
(a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
(b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
(c) who, being or indeterminate sex, identifies as a member of a particular sex by living as a member of that sex'