Anti-Discrimination
New South Wales

Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

In February this year an inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 was introduced with proposed changes to the Anti-Discrimination Act.

We are deeply concerned about the proposed changes in the Bill, which we believe will have the potential to deprive the people of NSW of their legal rights in matters of discrimination, vilification and harassment.

On Tuesday 9 June, Anti-Discrimination NSW President Dr Annabelle Bennett spoke directly to the Parliamentary Committee as part of the inquiry's public hearings. Below is her opening statement.

Opening Statement to the Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020

I welcome the opportunity to discuss the proposed Anti-Discrimination Amendment (Complaint Handling) Bill 2020 ("the Bill"). As the part-time President of the Anti-Discrimination Board, I will do my best to provide information to assist this inquiry.

I will assume that you are all familiar with the Anti-Discrimination Act 1977 and the application of that Act, to render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons. You would also appreciate that my functions are administrative in nature and not determinative: a primary role of the complaint mechanism is to conciliate between the parties. The functions provided for the President, through delegation, do not extend to making decisions on the merits of a complaint of discrimination. If conciliation cannot be achieved, and the complaint is accepted and maintained, it is referred to NCAT.

With respect, it is important to put the work of the Board and of ADNSW into perspective. Since its inception, the Board has dealt with thousands of complaints, since 2005 approximately 1000 complaints a year. It is fundamental that those complaints are afforded, as they are, procedural fairness. We are conscious to apply an approach where our responsibility is to both complainant and respondent. Any beneficial legislation can, in the words of the second reading speech for this Bill, be at risk of "misuse". However, this should be gauged against the evidence. Without wishing to burden the Committee with detailed statistics, it is worth noting that, in the last 5 years according to the Annual Reports, on average:

- 8.5% of complaints were settled before conciliation and 17% at conciliation

- 19% were declined under s 89B and a further 8% under s 92 and did not proceed further.
- 17% were withdrawn by the complainant (s 92B) and 15% abandoned (s 92C)
- 4% were referred to NCAT after being declined under s 92, where leave is then required from NCAT to proceed
- 13% were referred to NCAT under s 93C for reasons that include the formation of an opinion that the complaint cannot be resolved by conciliation, or that all parties wish the complaint to be referred and the President considers it appropriate in the circumstances to do so.

In accordance with normal provisions of administrative law, certain of the decisions of the President under the Act can be referred to NCAT, others to the Supreme Court. I do not propose to canvass, nor is it appropriate for me to give an opinion on, the circumstances of referral of Board decisions to NCAT.

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

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

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

Let me return to s 89B. I see some merit in providing for other considerations to determine, in the exercise of discretion, whether a complaint is accepted or declined, without the need to undergo investigation and the consequent utilisation of resources. One might be the proposed s 89B(2)(f) – that the President is of the opinion that the complaint, or part of the complaint, is frivolous, vexatious or misconceived. I would not include "lacking in substance", as that requires investigation and is better dealt with under s 92, where such provision exists. If I may, I would suggest that consideration might be given for an additional provision that extends to a **vexatious complainant**. I

also see merit in a provision enabling the decline of a complaint where it has been dealt with by the President, or an authority of the State, or the Commonwealth.

Three other general observations. First, questions of jurisdiction by reason of the residence of the respondent are currently under consideration by the Courts. Generally speaking, so far as I am aware, there are matters of legal complexity in the use of, and the receipt of information over, the internet and social media, including where it can be said that the statement was made. Secondly, care should be taken in the insertion of specific definitions that may be inconsistent with existing definitions, or already encompassed by definitions. Thirdly, care should be taken not to introduce uncertainty into the construction of the Act by providing for specific considerations which limit the broad discretion presently available.

I must repeat: I am most strongly of the view that any attempt to change the discretionary "may" to a mandatory "must" in either of s 89B or s 92 are misconceived, serve no purpose, would inhibit the work of ADNSW, be contrary to the public interest, have no demonstrated need or benefit and could well undermine the protections appropriately governed by the Act.

Dr Annabelle Bennett AC SC
President, Anti-Discrimination Board of NSW