

Anti-Discrimination NSW

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

April 2020

1 Introduction

Anti-Discrimination NSW (**ADNSW**) makes this submission to the Portfolio Committee No.5 – Legal Affairs on the Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (the **Bill**).

ADNSW thanks the Committee for the opportunity to provide feedback on the proposed changes in the Bill. ADNSW has significant concerns regarding the proposed changes to the way in which complaints are declined and the removal of avenues of review.

On behalf of the President and the Board, ADNSW administers the *Anti-Discrimination Act 1977 (NSW)* (**Act**), which makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status and carer's responsibilities. Vilification on the grounds of race, homosexuality, transgender status or HIV/AIDS status is also unlawful.

Many of the President's functions in relation to complaints are exercised under delegation by staff of ADNSW.

2 Summary

The exercise of the President's powers under the Act is underpinned by the principle that the Act is beneficial legislation that confers rights and remedies. A party to a complaint must be afforded procedural fairness before the decision maker makes any decisions that might deprive a person of redress for an alleged breach of the Act.

The proposed changes in the Bill have the potential to deprive people of their rights and remove established avenues for review of administrative decisions.

All decisions made by the President are administrative rather than judicial in nature. Removing existing rights of review would be out of step with principles of administrative law and may also risk reducing the protection of existing rights of the community in NSW.

The main changes proposed by the Bill appear to be:

- to remove the President's *discretionary* powers to decline a complaint under sections 89B and 92 and replace them with a *requirement* to decline if certain conditions were met;
- to remove a complainant's right to require referral of a complaint to the NSW Civil and Administrative Tribunal (NCAT) if it is declined by the President;
and

- to expand the list of grounds on which the President would be required to decline a complaint under s. 89B.

It is important to recall that sections 89B and 92 should be read together in order to appreciate the basis on which complaints can presently be declined, first on initial lodgement (s. 89B) and then during the course of investigation (s. 92). Clearly, it may be apparent that some claims should be declined “ab initio”, while in other cases a reason to decline a complaint may only become apparent on investigation. It is also, in the view of ADNSW, important that the existing discretion, which includes a discretion to take no further action in respect of a complaint “*for any other reason*”, enables a proper balance to be struck between the right of a complainant to bring a complaint within the Act and to allow for a proper consideration of complaints that should not proceed to the conclusion of the process. It may be that some further factors to guide the discretion could be introduced into the Act, and ADNSW is happy to give those further consideration, but it is imperative that discretion is maintained and that the decision is **not** mandatory. Changes as proposed would severely limit existing rights under the Act and are likely to give rise to more injustice than any perceived injustice that they may be intended to address.

It is also necessary to appreciate that the current provisions require consideration of the complaint and not the complainant. ADNSW is not presently called upon to comment on possible amendments to deal with, for example, a vexatious complainant.

3 Examination of proposed changes and existing provisions in the Act

The key proposed changes to the Act are to sections 89B and 92. ADNSW’s concerns about changes to sections 88B, 89B, and 92 are outlined below. The Bill also proposes consequential changes to other sections of the Act.

Each of sections 89B and 92 of the Act allows the President to decline complaints in specified circumstances. These sections should be considered together. Considered in their totality, it will be seen that these existing discretions already enable the President to take account of all of the matters that the proposed changes seek to introduce.

3.1 Section 89B – current provisions

Section 89B of the Act gives the President *a discretion* to accept or decline complaints for investigation. This discretion is exercised in relation to complaints upon receipt of the complaint, prior to formal investigation. At this stage of the complaint, the President generally only has information received from the complainant.

Complaints accepted for investigation under section 89B proceed to be investigated however may be declined at any stage of the President’s investigation under section 92 of the Act.

Section 89B of the Act provides:

Acceptance or declining of complaints by the President

- (1) *The President is to determine whether or not a complaint made to the President is to be accepted or declined, in whole or in part.*

- (2) *The President may decline a complaint if—*
- (a) *no part of the conduct complained of could amount to a contravention of a provision of this Act or the regulations, or*
 - (b) *the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint, or*
 - (c) *the conduct complained of could amount to a contravention of a provision of this Act for which a specific penalty is imposed, or*
 - (d) *in the case of a vilification complaint, it fails to satisfy the requirements of section 88, or*
 - (e) *the President is not satisfied that the complaint was made by or on behalf of the complainant named in the complaint.*
- (3) *The President is to give notice of a decision to accept or decline a complaint to—*
- (a) *the person who made the complaint, and*
 - (b) *if the respondent has been given notice of the complaint, the respondent, so far as is reasonably practicable, within 28 days after the decision is made.*
- (4) *A decision under this section to decline a complaint in whole or in part is not reviewable by the Tribunal.*

Section 89B(4) establishes that a decision made under section 89B by the President to accept or decline a complaint is not reviewable by NCAT. Where a complainant disputes the President's decision under s89B, the complainant has the right to seek judicial review by the Supreme Court of NSW.

Upon lodgement of a complaint, the President has the discretion to make a determination under section 89B whether or not to accept the complaint for investigation.

3.2 Section 89B – proposed changes

Change 1: Schedule 1[3] of the Bill proposes to change the word “may” in section 89B(2) to “must”.

This amendment would replace the President's discretion to decline complaints under section 89B with a strict requirement to decline a complaint if any of the conditions of section 89B appear to be met.

ADNSW opposes the removal of the President's discretion to decline complaints under section 89B(2) and considers that this removal would be contrary to the beneficial and remedial nature of the legislation.

For example, a mandatory direction would mean that, where complaints are made more than 12 months after the alleged contravening conduct, the President must decline the complaints even where there are valid and compelling reasons for a delay in lodging a complaint.

Decisions to decline complaints under section 89B are currently not reviewable by NCAT, and can only be challenged through Judicial Review proceedings in the Supreme Court of NSW.

ADNSW is concerned that requiring the President to decline complaints based on limited information and prior to investigation risks deterring people from reporting discrimination.

Change 2: Schedule 1[4] of the Bill proposes amending section 89B by inserting the following at the end of section 89B(2)(e) — ,

or,

(f) the President is of the opinion that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or

(g) 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, or

(h) the subject-matter of the complaint has been dealt with by the President, an authority of the State or the Commonwealth, or

(i) the President is of the opinion that the subject-matter of the complaint may be more effectively or conveniently dealt with by an authority of the State or the Commonwealth, or

(j) 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 evidenced by the individual's address on the electoral roll, and

ii) not in New South Wales, or

(k) the complaint falls within an exception to the unlawful discrimination concerned, or

(l) 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.

(2A) For 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.

The effect of these proposed changes would be to further amend section 89B by adding additional grounds on which the President would be required to decline a complaint. Some of the proposed grounds are similar to existing discretionary reasons for declining complaints under section 92, for example if the President is of the opinion that the complaint, or part of it, is frivolous, vexatious, misconceived or lacking in substance.

The President cannot investigate a complaint until after it is accepted under section 89B and it is not clear from the Bill, nor its Explanatory Note, how the President of ADNSW would be expected to form an opinion about the majority of these matters upon lodgement of the complaint *before* any investigation has taken place. For example, the President may need to conduct an investigation in order to establish who the correct respondent to the complaint is, their place of residence, whether and where any alleged public statement was made, or if another body had already dealt with the subject matter of the complaint. These are matters of fact or evidence that the respondent is best placed to provide to the President in the course of the investigation. ADNSW is concerned that removing existing rights of review would be out of step with principles of administrative law and may also risk reducing protection of rights granted under the Act to the community in NSW. ADNSW is also concerned that requiring the President to decline complaints based on limited information and prior to investigation risks deterring people from reporting discrimination.

Change 3: Schedule 1[5] of the Bill proposes amending section 89B by inserting after section 89B(4)-(5)

The President is to consider the following matters before determining that a complaint is frivolous, vexatious, misconceived or lacking in substance—

(a) *the number of complaints lodged by the complainant—*

(i) *in respect of the same respondent, and*

(ii) *in respect of the same or similar conduct,*

(b) *if the complainant has lodged more than one complaint in respect of the same respondent—any similarity in the conduct that is the subject of the complaint,*

(c) *any evidence that the complainant is not acting in the interests of justice.*

(6) *In this section— cognitive impairment includes an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia or a brain injury. public statement means any form of communication published in a newspaper or periodical, on a website or social media platform, or by radio or television broadcast or in a film.*

While the effect of this proposed change is uncertain, it would, in effect, insert new definitions of ‘*cognitive impairment*’ and ‘*public statement*’ to be included in section 89B. Notably the definition of *public statement* differs significantly from the Act’s existing definitions of *public act* in relation to vilification, as detailed below.

Proposed definition in the Bill:

public statement *means any form of communication published in a newspaper or periodical, on a website or social media platform, or by radio or television broadcast or in a film*

Existing vilification provisions are set out in Divisions 3A, 4, 4F and 5 of the Act and provide the following definition:

public act *includes—*

- a. *any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and*
- b. *any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and*
- c. *the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.*

The Bill also proposes to include the following definition of cognitive impairment:

cognitive impairment *includes an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia or a brain injury.*

The current definition of disability in the Act is broad and it is unclear how the President would be expected to determine if a respondent has a cognitive impairment prior to conducting an investigation.

Assuming that a person with any type of cognitive impairment is incapable of responding to a complaint may be, of itself, discriminatory. A cognitive impairment should not, per se, be a reason to decline a complaint, however the intellectual capacity of the parties may be a relevant factor in deciding whether and how to proceed to investigate a complaint. In each case, the parties' capacity will be a question of evidence, which may only come to light during the course of an investigation. This further emphasises the need for decisions about these factors to be discretionary.

The Act currently includes the following definition of disability:

disability means—

- a. *total or partial loss of a person's bodily or mental functions or of a part of a person's body, or*
- b. *the presence in a person's body of organisms causing or capable of causing disease or illness, or*
- c. *the malfunction, malformation or disfigurement of a part of a person's body, or*
- d. *a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or*
- e. *a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.*

The proposed schedule 1 [5] would require the President to consider certain matters before determining under section 89B that a complaint is frivolous, vexatious, misconceived or lacking in substance. These factors are

- (a) *the number of complaints lodged by the complainant—*
 - i. *in respect of the same respondent, and*
 - ii. *in respect of the same or similar conduct,*
- (b) *if the complainant has lodged more than one complaint in respect of the same respondent—any similarity in the conduct that is the subject of the complaint,*
- (c) *any evidence that the complainant is not acting in the interests of justice.*

ADNSW is concerned that these changes require the President to decline complaints on more stringent grounds, prior to any investigation of the complaint, and without obtaining necessary and relevant information upon which the President must base her decision.

ADNSW notes that multiple complaints about similar conduct may not of itself indicate that a complaint is frivolous, vexatious, misconceived or lacking in substance. It is possible that a respondent has engaged in a persistent and repeated pattern of discriminatory behaviour. In proceedings involving the application of the Act, NCAT has found that "*it does not necessarily follow that a multiplicity of proceedings on similar grounds constitutes vexation*".¹

¹ *Burns v Gaynor* [2015] NSWCATAD 211, at 19

ADNSW is opposed to the removal of the President's discretion to decline complaints under section 89B(2). People who experience harassment and discrimination are often vulnerable people and members of minority groups who may not be aware of appropriate avenues to complain and/or may have other related or unrelated issues in their lives preventing earlier complaints.

ADNSW is concerned that removing the President's discretion and replacing it with a mandatory requirement to decline certain complaints, where that decision is not subject to administrative review, would make the complaints process less accessible, particularly to people who have experienced trauma, and to people with various types of disability.

3.3 Section 92 –current provisions

Section 92 of the Act contains provisions regarding the President's powers to decline complaints **during** investigation. The current provisions provide for a discretion on the part of the President when determining if a complaint is declined during investigation.

If a complaint is declined under section 92, complainants have the right to request that their complaint is referred to NCAT under section 93A. However, if complaints are referred under section 93A, the complainant requires leave from NCAT under section 96 for the complaint to be the subject of proceedings.

Section 87B(4)(b) sets out the rights of complainants making complaints on behalf of others to have declined complaints referred to NCAT under section 93A.

Currently the President can refer complaints to NCAT under sections 90B, 93A, 93B or 93C.

Section 92 of the Act provides:

The President may decline complaint during investigation

1. *If at any stage of the President's investigation of a complaint—*
 - (a) *the President is satisfied that—*
 - (i) *the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or*
 - (ii) *the conduct alleged, or part of the conduct alleged, if proven, would not disclose the contravention of a provision of this Act or the regulations, or*
 - (iii) *the nature of the conduct alleged is such that further action by the President in relation to the complaint, or any part of the complaint, is not warranted, or*
 - (iv) *another more appropriate remedy has been, is being, or should be, pursued in relation to the complaint or part of the complaint, or*
 - (v) *the subject-matter of the complaint has been, is being, or should be, dealt with by another person or body, or*
 - (vi) *the respondent has taken appropriate steps to remedy or redress the conduct, or part of the conduct, complained of, or*
 - (vii) *it is not in the public interest to take any further action in respect of the complaint or any part of the complaint, or*

(b) the President is satisfied that for any other reason no further action should be taken in respect of the complaint, or part of the complaint, the President may, by notice in writing addressed to the complainant, decline the complaint or part of the complaint.

2. *The President, in a notice under this section, is to advise the complainant of—*

(a) the reason for declining the complaint or part of the complaint, and

(b) the rights of the complainant under sections 93A and 96.

3.4 Section 92: proposed changes

Change 4: Schedule 1[6] of the Bill proposes amending the heading of section 92 as follows:

Omit “may”. Insert instead “must”.

This proposed change would remove the President’s discretion to decline complaints under section 92 and replace it with a strict requirement to decline complaints if the President is satisfied that any of the section 92 conditions are met.

ADNSW is concerned that removing the President’s discretion in determining when to decline complaints could limit existing rights and deter people impacted by discrimination from making complaints. All other Australian jurisdictions allow discretion when accepting or declining discrimination complaints, although in Queensland, the Commissioner must reject a complaint where the Commissioner is of the reasonable opinion that it is frivolous, trivial or vexatious, or misconceived or lacking in substance. New South Wales would risk being out of step with similar jurisdictions if the existing broad discretion was removed.

Change 5: Schedule 1[7] of the Bill proposes making the following change to section 92(1):

Omit “may”. Insert instead “must”.

The effect of the proposed change would remove the President’s discretion to decline complaints under section 92 and replace it with a strict requirement to decline complaints if the President is satisfied that any of the section 92 conditions are met.

ADNSW is concerned that removing the President’s discretion in determining when to decline complaints could limit existing rights and deter people impacted by discrimination from making complaints. ADNSW is concerned that requiring all complaints that meet this criteria to be declined, would mean that people’s access to appropriate recourse for discrimination complaints could be limited.

Currently, section 92(1)(a)(i) states that a complaint may be declined if the complaint or part of the complaint is frivolous, vexatious, misconceived or lacking in substance. ADNSW is concerned that requiring the President to decline complaints where only part of the complaint meets this threshold, risks terminating meritorious complaints that are made concurrently with complaints of lesser substance. For example, if a complaint was made regarding a series of incidents of sexual harassment, the President would be obliged to decline the entire complaint if any of the alleged incidents did not meet the threshold.

ADNSW considers that the President's discretion to sever a complaint and accept only those parts of the complaint that appear to meet the threshold for acceptance, whilst declining the parts that do not meet this threshold, should be retained.

Currently, section 92(1)(a)(v) enables a complaint to be declined if the subject-matter of the complaint has been, is being or should be, dealt with by another person or body. This is a very broad provision and if the President were required to decline all complaints that could or are being dealt with elsewhere, many valid complaints would need to be terminated. It is the experience of ADNSW that a complaint can arise from complex and overlapping circumstances that are not fully addressed or even remedied in their entirety by one other jurisdiction alone. For example, if a person being evicted for reasons which include discriminatory conduct were to complain to a real estate agent or NSW Fair Trading, their complaint to ADNSW would have to be declined. Whilst the NSW Fair Trading proceedings could deal with the eviction, the issue of discrimination in events leading up to the eviction is not dealt with in that jurisdiction and the complainant is left without a remedy for the other harm suffered.

Change 6: Schedule 1[8] of the Bill proposes to make the following change to section 92(2)(b):

Omit "sections 93A and". Insert instead "section".

The effect of this change would be that the President would no longer be required to *notify* a complainant of their right have their complaint referred to NCAT under section 93A. The change is consequential upon the Bill's proposal (at schedule 1[11]) to remove section 93A entirely. ADNSW opposes the removal of section 93A, for reasons that are discussed in further detail below.

Change 7: Schedule 1[9] of the Bill proposes making the following change to section 92(3):

Insert after section 92(2)—

(3) The President is to consider the following matters in order to be satisfied that a complaint is frivolous, vexatious, misconceived or lacking in substance —

- a. the number of complaints lodged by the complainant in respect of the same respondent,*
- b. if the complainant has lodged more than one complaint in respect of the same respondent—any similarity in the conduct that is the subject of the complaint,*
- c. any evidence that the complainant is not acting in the interests of justice.*

The proposed change would require the President to consider these matters before determining under section 92, that a complaint is frivolous, vexatious, misconceived or lacking in substance. ADNSW again notes that multiple complaints about similar conduct may not indicate that a complaint is frivolous, vexatious, misconceived or lacking in substance, but could instead suggest a repeated pattern of discriminatory behaviour by a respondent.

Change 8: Schedule 1[1] of the Bill proposes making the following change to section 87B

– Complaints made on behalf of others:

Omit section 87B(4). Insert instead:

(4) On declining a complaint under subsection (3)(b), the President is to advise the complainant, by notice in writing, of the declining of the complaint.

The Bill, at Schedule 1 [1] removes the following from section 87B (4):

On declining a complaint under subsection (3)(b), the President is to advise the complainant, by notice in writing, of –

- a. the declining of the complaint, and*
- b. the rights of the complainant under section 93A.*

This change removes the right to seek referral to NCAT under section 93A for complaints made on behalf of others. ADNSW is again concerned about the proposed removal of the right to have declined complaints referred to NCAT. Removal of avenues to appeal administrative decisions may limit procedural fairness and deter people from making complaints regarding discrimination.

Change 9: Schedule 1[10] of the Bill proposes the following change to section 92A – *Settlement or resolution of complaint.*

Omit section 92A(2).

This proposed change would remove a further reference to section 93A (Referral of complaints to Tribunal at requirement of complainant), which section the Bill proposes to remove.

Currently section 92A(2) provides that a complainant who settles or resolves a complaint *cannot* request the complaint to be referred to NCAT under section 93A. Removal of the subsection will create uncertainty for all parties to settled complaints as to whether the complaint is in fact finalised.

Change 10: Schedule 1[11] of the Bill proposes to make the following change to section 93A – *Referral of complaints to Tribunal at requirement of complainant.*

Omit the section.

This change would remove a complainant's right to have their complaint referred to NCAT if the President declines it during investigation. Currently, a complainant in this situation may require the President to refer their complaint to NCAT under section 93A; however leave of NCAT is required for the matter to proceed.

ADNSW is concerned that the proposed change would remove complainants' rights to have decisions reviewed. People experiencing discrimination or harassment may be particularly vulnerable and further reducing their rights could risk increasing their vulnerability.

The proposed change creates a situation where the President's decision is without the checks and balances inherent in administrative law. Removing existing rights of review

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

The combined impact of requiring the President to decline complaints under section 92 and removing the avenue to appeal to NCAT under section 93A may have a significant impact on access to justice and a lack of recourse for acts of unlawful discrimination in NSW.

Change 11: Schedule 1[12] of the Bill proposes the following change to section 95 – *Referral of complaints to Tribunal:*

Omit “93A” from section 95(1)

This change removes another reference to complaints referred to NCAT under section 93A, and is consequential upon the proposed removal of the right to request referral, which is discussed above.

Change 12: Schedule 1[13] of the Bill proposes the following change to section 96 – *Leave of Tribunal required for inquiry into certain matters*

Omit section 96(1)

The Bill proposes to remove reference to section 93A from section 96. Section 96 deals with when leave of NCAT is required for inquiry into certain matters

3.5 Section 88B – current provisions

Section 88B of the Act includes provisions for making of complaints that have been made in another jurisdiction.

Section 88B of the Act provides:

Making of complaints in more than one jurisdiction

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.*

3.6 Section 88B: proposed change

Change 13: Schedule 1[2] of the Bill proposes to omit section 88B – *Making of complaints in more than one jurisdiction.*

The proposed change would remove section 88B, which makes it clear that a person is not prevented from making a complaint merely because they have made a complaint or taken proceedings in relation to the same facts in another jurisdiction, whether in NSW or elsewhere. To ensure fairness, NCAT is required to have regard to any such proceedings, and their outcome of, in its dealing with the complaint.

ADNSW is concerned that removing section 88B of the Act will deter people experiencing discrimination from making complaints with the result that people in NSW would be less able to obtain redress for acts of unlawful discrimination. Discrimination law across Australian state and commonwealth jurisdictions is highly complex and people experiencing discrimination are not always aware of the most appropriate forum to complain about unlawful discrimination. For example, a person may allege unfair dismissal and complain to the Fair Work Commission, in circumstances where the reasons for the dismissal included unlawful discrimination contrary to the Act. ADNSW is concerned that the removal of NCAT's discretion to accept complaints that have been made in other jurisdictions would deprive people of appropriate avenues of redress for acts of unlawful discrimination.

Anti-Discrimination NSW
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