HRLA
HUMAN RIGHTS · LAW ALLIANCE

Our ref: 20-0020

SUBMISSION TO THE NSW LEGISLATIVE COUNCIL

DATE: 1 May 2020

TO: Legislative Council Portfolio Committee No. 5

FROM: Human Rights Law Alliance Limited

RE: **ANTI-DISCRIMINATION AMENDMENT (COMPLAINT HANDLING) BILL 2020**

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1. This is the submission of Human Rights Law Alliance (**HRLA**) to the Portfolio Committee of the NSW Legislative Council in relation to the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*. We welcome the opportunity to make submissions and would welcome any opportunities that arise to speak in support of this submission.

ABOUT HRLA

2. HRLA was established in 2019 as a not-for-profit law firm based in Canberra, ACT that acts for parties in all States and Territories of Australian in matters involving freedom of religion, thought, speech and conscience.

3. HRLA's objectives are to see strong protections for religious freedom and expression in Australia. A core part of HRLA's work is to defend people of faith who face legal action aimed at silencing their freedom of thought and speech, and to be a voice advocating for good laws which preserve and protect religious liberty and viewpoint diversity in Australia.

4. In its initial year of operations, HRLA has assisted in over fifty religious freedom matters and provided legal assistance in over twenty legal disputes that have been the subject of disciplinary and Court proceedings, including in matters where individuals have been the subject of complaints under the *Anti-Discrimination Act 1977* (NSW) (**the Act**) which the Bill seeks to address.

5. In this context, HRLA provides the following submission on the Bill.

EXECUTIVE SUMMARY

6. HRLA broadly supports the Bill. Reform of the Act is sorely needed and long overdue and the Bill takes steps to address significant shortcomings with the operation of the NSW anti-discrimination system. Whilst broadly supporting the Bill, The Human Rights Law Alliance does not support the removal of section 93A from the Act. Instead, we propose alternative amendments to achieve a similar outcome.

7. HRLA considers that the Bill should include further amendments to the Act and to the *Civil and Administrative Tribunal Act 2013* (NSW) (**the NCAT Act**) to prevent misuse of the complaints

procedure under the Act for political purposes, to provide a broader basis for the President of the Anti-Discrimination Board (**Board**) to reject vexatious and malicious claims and to provide less of a platform for activists to weaponise the Act's complaints procedures to attack freedom of religion, thought, speech and conscience in Australia.

8. HRLA would direct the Legislative Council's attention to the work of the Parliamentary Joint Committee on Human Rights into freedom of speech in Australia and its report on that inquiry which contains cross-party bipartisan recommendations for complaints handling reform, many of which were enacted in the *Human Rights Legislation Amendment Bill 2017*. HRLA would support the Bill being extended to make amendments consistent with these recommendations.

9. HRLA submits that the NSW Parliament should consider a full review of the NSW discrimination regime, as there are systematic problems that go beyond the Act which suggest that the main problem is not primarily the Act, but how it is currently administered. We address this more pressing concern before we set out our submission in relation to the Bill.

10. Throughout our submission, we use relevant case examples to support our submissions.

FUNDAMENTAL REVIEW OF THE NSW DISCRIMINATION REGIME

11. HRLA notes that the main problem the Bill seeks to address of poor complaints handling is not really a problem with the Act, but a problem with the way the Act is currently administered.

12. The Board and the Tribunal already have sufficient powers to deal with serial complainants and to administer complaints handling procedures in a way that promotes fairness and justice.

13. It is concerning that the Board and the Tribunal are currently allowing serial and vexatious claimants to unjustly pursue clearly unmeritorious claims through NSW Courts with the powers that they already have. HRLA strongly recommends that as well as the Bill, further reform should be considered including:

    13.1 a root and branch review of the whole NSW discrimination system administered by the Board and the Tribunal; and

    13.2 a legislative requirement for the Board and Tribunal to report to the NSW parliament and review on compliance with their obligations under the Act and the NCAT Act; and

    13.3 removal of the provisions of secrecy and confidentiality in relation to complaints by serial complainants (complainants who have made 3+ complaints) to allow transparency of justice.

CASE STUDY 1: Client (de-identified)

PROBLEM: An HRLA client is a small business owner in Queensland. In January 2020, the client was one of many commenters on a Facebook post for a petition opposing a Drag Queen Story Time event in

Brisbane public libraries. It was a local petition for Brisbane residents. The client posted that it was inappropriate to have adult entertainers reading stories to kids where many adult entertainers are involved in drugs and prostitution. The post did not mention homosexuals. A serial litigant in NSW linked the post with the client's small business and sent an e-mail threatening a claim of homosexual vilification in NSW under the Act and stated that they would be "seeking damages". The activist also sent the client a purported media release naming the client, her business, her previous address and her mobile phone number, thus engaging in "doxxing" – publishing personal information to encourage harassment and malicious attacks against the client.

The client ignored the threat and heard nothing more until receiving an e-mail from the NSW Board in April 2020 stating that it had written to the client about the complaint (the letter had not been received) and that it had heard nothing. The e-mail required a response within 30 days and threatened that the NSW Board had powers to compel a Queensland resident to provide it information and threatened to proceed with the complaint. This was the first correspondence the client had received from the Board.

While the client has not yet seen the complaint, presumably, The Board is already aware that:

- the complainant is vexatious and a serial complainant;
- the client lives in Queensland not NSW;
- the client was posting from Queensland on a local Brisbane issue;
- the client did not make any reference to homosexuals in the post; and
- the client has no connection with the vexatious claimant.

Clearly the claim has no merit. The Board should not enable this complaint and already has powers to decline the complaint at first instance under the Act. Nonetheless, NSW public servants at the Board have threatened to compel a QLD resident to produce information in their very first correspondence after failing to ensure proper service of the claim.

SOLUTION: A full review of the antidiscrimination regime in NSW is warranted as well the removal of confidentiality and secrecy provisions that protect poor practice and ideological bias within the Board and equip vexatious litigants to harass innocent Australians.

14. The above case study suggests that the Board is not effectively using existing powers to dismiss vexatious complaints, and misusing its powers to overreach and threaten residents outside their jurisdiction to comply with document production orders.

15. Further it is unclear how many other Queensland residents who posted on the internet in opposition to drag queen story time have been targeted by this NSW serial complainant with claims. Secrecy provisions in the Act prevent any oversight of the extent to which these vexatious claims are being made and the extent to which the Board is subsidising these claims.

16. In March 2020, a high-profile claim by a serial litigant against Israel Folau was declined by the Board on the basis of lacking substance and being vexatious and malicious. In contrast, the Board has entertained a claim against a QLD small business owner who is resident of another State despite currently having sufficient power under the Act to ensure that the claim doesn't proceed.

17. This kind of inconsistency in approach, and the support by the Board for a clear misuse of the existing discrimination regime, requires a review of the ineffective use of existing powers by the Board.

18. Thus, the Bill needs to do more than just amend the powers of the Board and Tribunal.

19. We now address the HRLA's submissions on the Bill itself.

HRLA SUPPORTS THE PROPOSED AMENDMENTS

20. In broad terms, the Human Rights Law Alliance supports all of the amendments proposed by the Bill. The proposed amendments are commendable reforms to a complaints system that sets a very low bar for acceptance of complaints and which has been misused by activists to attack fundamental freedoms.

21. The Bill seeks to amend sections of the Act that provide opportunity for vexatious litigants to abuse the anti-discrimination complaints process. In particular the Bill seeks to create a clear responsibility on behalf of the President to refuse complaints that do not pass a legitimacy threshold. This is commendable.

22. The Bill highlights deficiencies in the current NSW anti-discrimination system that have long been subject to abuse. The proposed changes will help alleviate pressure on an already stressed legal system by reducing costs, time-wastage and helping to ensure that legitimate complaints receive deserved attention and resources.

23. With the Act in its current state, there is a worrying proliferation of complaints being targeted at the same individuals, for broadly the same reasons. These complaints, often from the same serial litigants are not only being entertained by the Board under the current Act, but the resulting matters drain significant time and resources from the NSW justice system. The cumulative processes that respondents face end up dealing out a far greater punishment than any of their allegedly vilifying behaviour could possibly warrant.

CASE STUDY 2: Bernard Gaynor

PROBLEM: Bernard Gaynor is a Queensland resident who has been subjected to a half-decade legal battle over his conservative internet blogging and promotion of Christian views of marriage, gender and the family. An LGBT+ activist in NSW has filed over 30 complaints of discrimination and vilification against Mr Gaynor for the views expressed on his blog. Defending these accusations has been stressful, time consuming and costly for Mr Gaynor and he has incurred over $400k of legal fees.

Mr Gaynor has been unable to have complaints dismissed as vexatious harassment, and unable to get claims consolidated into a manageable single proceeding despite the fact that not a single

discrimination claim against him has ever been successful. All of these complaints have been filed by the same NSW complainant and have been the subject of a proliferation of claims and counter-claims by the respective parties that the Board and the Tribunal have spent huge sums administering and adjudicating.

SOLUTION: Implementing the changes suggested in the Bill, particularly those that amend the exercise of the President's discretion to dismiss vexatious complaints will help put an end to the litigious abuse of the NSW anti-discrimination complaints process.

Require the President to dismiss certain complaints

24. HRLA welcomes the suggested change to the language in sections 89B and 92 from "may" to "must". This amendment echoes the call by Professor Anne Twomey for the decision maker's power in this situation to be better exercised. Professor Twomey made this point in evidence to the Parliamentary Joint Committee on Human Rights in its review of the analogous complaints regime under the *Australian Human Rights Commission Act 1986* (Cth) (**the AHRC Act**).[1]

Additional grounds added to section 89B

25. The Human Rights Law Alliance welcomes the suggested additional subsections 89B(2)(f)-(l). Too many complaints that should never have made it past the President are taking vital time and resources away from other legitimate concerns in the NSW justice system.

26. These additional measures are a good start in making sure that the President declines a complaint if they perceive it to be vexatious or malicious. In particular we support the addition of clause 89B(2)(l).

27. There is evidence of significant time and resources being wasted in the pursuit of vexatious claims against vulnerable individuals who suffer from a cognitive disability and as a result cannot help or filter themselves when engaging in public discourse on political and social issues.

CASE STUDY 3: John Sunol

PROBLEM: John Sunol suffered a car accident in the late 1970's and suffered mental disability as a result. He is taken to engaging in strong online posts against the Sydney Mardis Gras, Muslims and on other contentious social topics. He has few online followers, no material impact and no real social media influence. Serial litigant activists discovered Mr Sunol's online social media posts and have

subjected him to intense lawfare by using the NSW Act to file multiple complaints. More than 20 cases against him have come before the NSW Tribunals and Courts. Mr Sunol is bankrupt, cannot pay his court ordered fines and faces jail time. Due to his disability, he cannot appreciate the seriousness of his position, nor can he find suitable relief to help him. Much of the leading case law in relation to the Act has been produced as a result of cases involving Sunol, often in a self-represented capacity. Without the aid of expert arguments being advanced by competent counsel in meritorious claims, the Tribunal will develop bad precedent that adversely affect future legitimate claims. This should not happen. The NSW Anti-Discrimination regime was not designed to allow this kind of predatory victimisation of seriously ill people, the regime was designed to help people like Mr Sunol. The fact that the current system aids and abets serial litigious activists to persecute mentally unwell people instead of using those resources and time on real cases is a serious issue.

SOLUTION: Insert a protection in the Act, such as the suggested clause 89B(2)(l) that will give the President the discretion to recognise people who suffer from disability and to decline complaints that are made against them. This will prevent unfair treatment of the disabled and prevent the Tribunal producing poor precedents.

Retain section 93A of the Act with alternative amendments

28. The only measure that HRLA does not support is the proposal of the Bill to delete section 93A from the Act and the consequential amendments to that deletion. HRLA recognises the intention of the proposed change is to prevent politically motivated litigants from requiring the Board to refer vexatious, malicious and insubstantial claims to the Tribunal. This is a real problem that needs to be fixed.

29. While HRLA broadly supports the suggested amendments in the Bill, we consider that section 93A should not be removed. This section is a crucial part of the necessary administrative oversight of the Tribunal and Courts in NSW of decision makers exercising delegated executive authority.

30. Removing the section will not just affect the ability of pernicious serial litigants to waste the system's time, but will also bar complainants with legitimate complaints from seeking real justice. The President may not always make the correct decision by dismissing a complaint and there needs to be an avenue for review and appeal.

31. Our experience of the discrimination regimes in various State Commissions, Boards and Tribunals leads us to consider that giving unreviewable powers to strike out claims can be problematic. In our experience, the public servants administering these laws often have a uniform socio-political viewpoint that can prejudice their ability to determine what is vexatious.

CASE STUDY 4: Byron and Keira Hordyk

PROBLEM: Byron and Keira are a Christian couple from WA who applied to become respite foster carers for children between the age of 0-5 in January 2017. They were promptly rejected by the foster care agency and labelled as "unsafe" due to their traditional Christian beliefs about gender and sexuality. Byron and Keira said they would love any foster child who was placed with them, but that they couldn't affirm or promote a sexual identity that conflicts with their Christian convictions. Shortly afterwards, Byron and Keira lodged a complaint with the Equal Opportunity Commission under the *Equal Opportunity Act 1984 (WA)*.

In 2019, the WA Equal Opportunity Commission dismissed Byron and Keira's complaint of religious discrimination after unsuccessful conciliation. The Acting Commissioner determined that their claim was "misconceived and not substantiated". Byron and Keira required the Commission to refer their complaint to the State Administrative Tribunal under an equivalent provision to s93A of the NSW Act.

In late 2019, the foster care agency made an application to strike out Byron and Keira's claim on the basis that it was misconceived and lacking in substance. This agency's attempt to knock out the claim in the Tribunal was unsuccessful[2]. The Horydks clearly have an arguable claim and it is currently being prepared for hearing in late 2020. However, if the WA Act did not include the ability to refer the claim to the Tribunal, it would have been terminated at first instance and the Hordyks would have no recourse to justice. Removal of section 93A will not only prevent vexatious claims from advancing to the Tribunal, it will also allow the Board to be free from oversight of any ideological bias in the way that it exercises its powers.

SOLUTION: Retain section 93A of the Act, but put in place other disincentives for vexatious serial complainants to require claims to be forwarded to the Tribunal such as requiring security for costs and making recovery of costs available where a Tribunal confirms a Board decision that a claim is misconceived, lacking in substance, vexatious and or malicious.

32. HRLA suggests that instead of removing section 93A from the Act that alternative amendments are made that will dissuade vexatious litigants from using the section but to allow people with legitimate complaints to do so.

33. A viable alternative would be an enlivening of costs against a vexatious complainant. This would mean that the NCAT Act would be amended to award costs against the complainant if their

[2] *Hordyk v Wanslea Family Services Inc* [2019] WASAT 146

complaint is found to be vexatious and misconceived by the Tribunal and they have used section 93A of the ACT to refer the matter to the Tribunal after the President had dismissed the complaint.

ADDITIONAL SUGGESTED AMENDMENTS

34. The Human Rights Law Alliance suggests that additional amendments be made to combat the rising tide of vexatious abuse of the vilification provision in the Act.

"Public Act" Definition

35. As it stands the definition of "public act" in section 49ZS is too broad. A significant issue that arises with vilification complaints by vexatious litigants is that of "forum shopping".

36. The homosexual and transgender vilification laws in NSW are known to be broad and with a low entry-point for complainants. They have been used by serial litigants to pursue claims against residents in other states when the legislation in those states either does not make unlawful the complained of act, or sets too high a bar for the complainant.

37. HRLA recommends that the definition of "public act" everywhere it appears in the Act should be changed so that the act must be carried out in NSW and experienced/received by the complainant in NSW. This will also be a narrow amendment that will affect vilification proceedings rather than being of broad application to all claims being made under the Act.

38. Further, it reflects the reasoning of the NCAT in its dismissal of a serial litigant's claims against Mr Gaynor:[3]

> *17. In my opinion there was no relevant public act by Mr Gaynor in NSW. His acts of posting material on his computer were public acts but they took place in Queensland. It was the separate act of Mr Burns himself, not of Mr Gaynor, which caused the material to be downloaded in NSW. As it happened Mr Gaynor lived in Queensland not far from the NSW border. However, if Mr Burns' argument is correct, a person who never leaves a country which permits (or even encourages) the publication of material vilifying homosexuals and who uploads vilifying material on his computer could be held liable to pay damages under the Act to a complainant if such complainant, or someone else, downloads the material in NSW. This would be so even though the complainant was not known to the uploader and was identified only by reference to a very large class of persons to which the complainant claimed to be a member. In my opinion such a circumstance is beyond the reach of the NSW Parliament.*
>
> *18. Accordingly, I hold that, on the unchallenged evidence, there was no public act in NSW by Mr Gaynor which could constitute the unlawful conduct proscribed by s49ZT of the Act. Mr Gaynor has established his entitlement to an order under s102 of the Act as the proceedings before the Tribunal are misconceived.*

A Higher Threshold of Standing to Bring a Complaint

39. The current standards that the Act sets for standing are so low that practically anybody can make a complaint to the Board with little to no material connection to the respondent or their actions.

40. Especially for vilification actions, complainants should be required to include in their complaint evidence and details of how the actions of the respondent have directly affected them individually or

[3] *Burns v Gaynor* [2015] NSWCATAD 211

as a defined group if they are not lodging a complaint on behalf of someone else. They should not be able to lodge a complaint for the mere reason that they represent as possessing an attribute class that they allege the respondent has vilified (homosexuality, transgender, HIV/AIDS, race, etc.).

Mandatory collating of Complaints

41. If there are multiple identical complaints from the same complainant made against the same respondent, the Board should be required to collate these complaints into the single proceedings. This reduces pressure on the complaints system and also mitigates the stress and burden on both parties.

42. The Board should also be given power to dismiss complaints when there are multiple subsequent complaints by the same complainant against the same respondent on the same subject matter and the complaints are so similar in nature that there will be no added value by the Board entertaining the complaint.

Limit President's Assistance of Claimant

43. There should be sensible limitations put in place to limit the Board's assistance of complainants.

44. There is good reason why the Board should assist a complainant who makes one complaint in an instance where a legitimate case of discrimination or vilification of that person has happened. That person may lack means to pursue a substantively legitimate claim.

45. However, assistance should not be provided to serial vexatious litigants who are not pursuing legitimate ends. HRLA recommends that boundaries should be placed around the provision of assistance to prevent any serial litigant from receiving assistance.

SUGGESTED AMENDEMENTS FROM THE PARLIAMENTARY JOINT COMMITTEE

46. The HRLA submits that a helpful reference for such further amendment is the inquiry conducted by the Parliamentary Joint Committee on Human Rights into freedom of speech in Australia and its report on that inquiry, the "Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)"[4]. All of the Committee recommendations were unanimous and had bipartisan support. This reflects that all sides of politics are legitimately concerned to ensure that discrimination regimes are appropriately balanced, efficient, just, and not used for political purposes or to prosecute personal vendettas.

Higher Standard for Complaints

Full Details

47. Section 89 in the ADA only requires that the complaint be in writing and that as made, the complaint need not demonstrate a prima-facie case. This sets the bar far too low. A complaint in writing should

[4] Parliamentary Joint Committee on Human Rights, "Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)" (28 February 2017), last accessed 1 May 2020, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Report/a03>

set out enough details so that the complaint is sufficient to demonstrate that the respondent has allegedly contravened the Act.

An act, which if true, would constitute unlawful discrimination

48. The complainant should also be required to provide sufficient detail that demonstrates that the alleged act, if true, would constitute an act of unlawful discrimination under the Act. Therefore, the complainant should be able to show *why* they are complaining. This better serves the discretion of the President and helps save time and resources in the processing of the complaint.

Reasonable Assistance for Respondents

49. The Act gives the Board broad powers to assist complainants. This is warranted in many situations where the complainant does not have the capacity or means to pursue their legitimate complaint. However, there are many instances as demonstrated in the above case studies where respondents are targeted and harassed through the misuse of the complaints process. The Board should be empowered to provide reasonable assistance to respondents who also lack the capacity or means to defend themselves from vexatious litigants.

Lodgement Fee

50. Complaints currently have very little to dissuade them from making misconceived or vexatious complaints. A refundable lodgement fee with similar arrangements that mirror those used in other Courts for lodgement fees should be implemented. This will stop multiple complaints and encourage complainants to bundle their own complaints.

Further Inquiry not Warranted

51. An additional ground to refuse a complaint should be included in section 89B of the Act. This ground should allow the President to terminate further entertaining the complaint if they are satisfied when considering all the circumstances of the case that continuation of any inquiry into the matter is not warranted.

Unreasonable Conduct

52. The President must be able to order costs against a complainant if the complainant or counsel has conducted themselves in a manner that is unreasonable in the circumstances. The purpose of this discretionary power is to dissuade frivolous claims being entertained by the Board and NCAT.

Must Consider Application of Exemptions

53. The Parliamentary Joint Committee suggested that under the AHRC Act the President must consider applications of the relevant exemption when considering an application for unlawful discrimination. Similarly, we suggest that the President of the Board must consider any relevant exemptions to the unlawful act being alleged when deciding if a complaint should be accepted or dismissed under section 89B.

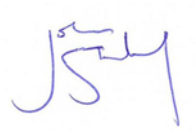
CONCLUSION

54. The HRLA welcomes the Bill and the proposed amendments. Vexatious claims by serial litigants are a serious problem for the anti-discrimination regime in NSW and measures must be taken by the Parliament to ensure that the system works properly and in the interests of vulnerable people who

have legitimate complaints, not serial litigants who conduct political lawfare against ideas that they do not like.

55. The Bill is a start but more needs to be done to reform the NSW Anti-Discrimination regime. The above suggested extra amendments go some way to addressing this reformation and are in line with what has been suggested by the Parliamentary Joint Committee in reforming the federal regime.

Yours faithfully,



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