



24 April 2020

## **Kingsford Legal Centre**

### **Submission to the inquiry into the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020***

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NSW discrimination law has not been comprehensively reviewed since the report of the NSW Law Reform Commission in November 1999.<sup>1</sup> The area of law needs comprehensive reform to modernise it, address gaps in protection for vulnerable people, achieve harmony across Australian jurisdictions and increase access to justice.

The *Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (NSW) (**the Bill**) would not provide such reform. It would continue a piecemeal approach to discrimination law reform that fails to address underlying issues. The Bill raises due process concerns, would restrict access to justice for vulnerable people and has the potential to impact on public confidence in the discrimination complaints system.

Kingsford Legal Centre (**KLC**) welcomes the opportunity to make this submission to the inquiry into the Bill. In this submission, “**the Act**” refers to the *Anti-Discrimination Act 1977* (NSW) and “**the President**” refers to the President of the Anti-Discrimination Board (**ADB**).

### **Summary of recommendations**

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We recommend that the NSW Government:

1. Reject the Bill;
2. Start a collaborative process with other jurisdictions to set up a consistent national framework for discrimination protection;
3. Guarantee increased funding to the legal assistance sector generally and specialist discrimination law services specifically;

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<sup>1</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No. 92, 1999) <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-92.pdf>>.

4. Address concerns about inappropriate complaints by making discrimination law tests simpler;
5. Increase funding for the ADB to help strengthen public education around discrimination and provide a more effective preventative strategy; and
6. Conduct further consultation on how to improve discrimination processes and accessibility for people with cognitive disabilities with relevant peak bodies such as the Council for Intellectual Disability.

## **About Kingsford Legal Centre**

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Kingsford Legal Centre (**KLC**) provides free legal advice, casework and community legal education to our local community in south-eastern Sydney. We specialise in discrimination law and have a state-wide Discrimination Law Clinic. In 2019, we gave 248 discrimination law advices.

KLC also has a specialist Workers' Rights Clinic and is a provider of the Migrant Employment Legal Service (**MELS**), addressing the exploitation of migrant workers in NSW.<sup>2</sup>

We are part of the UNSW Sydney Law Faculty and provide clinical legal education to over 500 of its students each year. KLC has been part of the south-eastern Sydney community since July 1981.

## **Purpose of discrimination law**

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Discrimination law recognises that diverse groups of people are systematically marginalised within our society. Marginalised people often experience violence and other forms of ill-treatment. They get neither the same opportunities nor the same outcomes as non-marginalised people.

Discrimination hurts marginalised people, their families and their communities. It is inconsistent with community values, such as a "fair go", and has economic implications. For example, discrimination in the workplace can mean that marginalised people do not get jobs for discriminatory reasons, rather than merit. In such situations, it is not only marginalised people who miss out on a job – organisations and Australian society also miss out on having the best people in a role.

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<sup>2</sup> MELS is a joint initiative of the Inner City Legal Centre, Kingsford Legal Centre, Marrickville Legal Centre and Redfern Legal Centre.

Discrimination law is fundamentally about human rights and implements international human rights treaties to which Australia is a party. These include the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of Persons with Disabilities*.

Given that the purpose of discrimination law is to protect human rights, there should be a beneficial approach to discrimination law that maximises access to justice. Proposals to limit access should be closely scrutinised and not lightly adopted.

**Huda's story: Discrimination law ensuring inclusion**

Huda was a member of her local club, which she regularly attended – it was a big part of her social life and gave important structure to her week. One afternoon at the club, another patron made disparaging comments to Huda, including comments about her disability. Huda was very upset and reacted to the comments, which resulted in the club deciding to cancel her membership and ban her from returning to the club.

Huda made a written complaint to the ADB, but did not give enough detail about her disability and what happened at the club. She then came to KLC and we helped her by adding relevant details to her complaint and clarifying what happened. One of our solicitors also attended a conciliation with Huda. We were able to negotiate with the club to have the ban lifted so that Huda was able to rejoin as a member and continue to attend. Huda was very pleased with the outcome and is now a member of her local club again.

**Schedule 1[1]: Complaints made on behalf of others**

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Advising complainants of their right to have their complaint referred to the NSW Civil and Administrative Tribunal (**NCAT**) plays an important role in helping complainants to understand their rights and facilitating access to justice. When a complaint is made on behalf of another person and the President declines the complaint, section 87B(4) of the Act should continue to require that the President inform the complainant in writing of the complainant's right to have the complaint referred to NCAT.

## **Schedule 1[2]: Making of complaints in more than one jurisdiction**

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Australian discrimination law is jurisdictionally complex. It includes 13 pieces of legislation – some at the federal level and some at the State and Territory level. There are both significant overlaps and differences, raising difficult questions as to what is the most appropriate jurisdiction in which to make a discrimination complaint.

Discrimination law also interacts with other areas of law, including employment law, tenancy law and consumer law. The interaction of discrimination law with other areas of law can further complicate jurisdictional questions.

Due to the complexity of discrimination law, complainants often need specialist legal advice at an early stage in their case to make sure that they make a discrimination complaint in the most appropriate jurisdiction. The complexity of discrimination law and underfunding of the legal assistance sector are significant factors in discrimination complaints being made in less appropriate jurisdictions. This is especially the case for vulnerable people who often face greater barriers when accessing the complaints process.

In KLC's experience many complaints are made in the "wrong" or multiple jurisdictions because the complainant has been unable to access legal help and does not understand the system. This is exacerbated by the existence of Commonwealth and NSW jurisdictions. It is also impacted by short time limits in discrimination law, and complainants may take a scatter gun approach for fear they may lose a right. These issues go to both the inaccessibility of the law in this area and the limited access to legal services for people who want discrimination law advice.

A blanket prohibition on complaints being made in more than one jurisdiction is a blunt instrument. It would rob the President and NCAT of the ability to consider legitimate reasons and personal factors as to why such complaints had been made. We note that section 88B(2) of the Act says that NCAT must have regard to any proceedings in relation to the same facts in another jurisdiction in dealing with or determining the complaint. Section 92(1)(v) further allows the President to decline a complaint if the President is satisfied that "the subject matter of the complaint has been, is being, or should be, dealt with by another person or body". Having regard to the complexity of Australian discrimination law, KLC considers that these sections provide appropriate safeguards against forum-shopping by complainants and the improper exercise of jurisdiction by the President and NCAT. It is not our experience that forum shopping is

extensive or a significant drain on resources, the more common scenario is the one in which the complainant is completely bamboozled as to the best avenue for their complaint.

A blanket prohibition on complaints being made in more than one jurisdiction would form a barrier to complaints coming before the most appropriate decision-maker for resolution and restrict access to justice, especially for vulnerable people. It is important to remember that international human right principles underpin all discrimination law and as a result there should be a beneficial approach to legislation that enables people to protect their rights. In light of these important human rights considerations, there are more appropriate ways of directing complaints to the most appropriate jurisdiction. The NSW Government should start a collaborative process with other jurisdictions to set up a consistent national framework for discrimination protection. The Council of Attorneys-General could be an appropriate forum for starting such a collaborative process. The NSW Government should also guarantee increased funding to the legal assistance sector generally and specialist discrimination law services specifically to increase the number of people who are able to get specialist discrimination law help and to minimise misguided applications based on a lack of legal advice.

### **Schedule 1[3]: Acceptance or declining of complaints by the President without an investigation**

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Schedule 1[3] of the Bill would require the President to decline complaints in a broad range of circumstances before an investigation has even taken place. Declining a discrimination complaint without an investigation has significant due process implications. It is not a step that should be taken lightly, especially in the context of legislation designed to protect human rights and where complainants are often people with limited resources.

In our experience it is common that the merit of a complaint becomes apparent only after an investigation has started. Because discrimination law is so complex, it can be difficult to present a complaint in the most legally favourable light, especially for vulnerable people who have not received specialist discrimination advice. Perpetrators of discrimination often have critical information and documents, which the President and the complainant only get after an investigation has started. Complainants often do not have this at complaint stage and require assistance to obtain this material. This is especially the case in relation to employment disputes where the supporting documentation is almost always held by the employer. This is why KLC has favoured a

reverse onus once the complainant has been made for the respondent to rebut the allegation. The Bill will further exacerbate the information imbalance when it comes to discrimination law complaints, in that the complainant often does not have access to all the relevant material at the time of the complaint despite their best endeavours.

**Lyra's story: Refused a job due to mental illness**

Lyra successfully interviewed for a position as a support worker with a community organisation. When the employer gave Lyra the contract of employment, Lyra told the employer that she had been diagnosed with a mental illness. The employer then refused to offer Lyra the job, but did not provide a reason. Lyra made a complaint to the ADB that she had been discriminated against on the ground of disability.

We attended a conciliation with Lyra at the ADB, where Lyra was able to ask more questions about why she was not given the job within a confidential conciliation setting. The complaint eventually settled, and the community organisation gave Lyra a written apology and monetary compensation. The community organisation also agreed to review their training and recruitment processes to enhance anti-discrimination.

Schedule 1[3] of the Bill would force the President to decline a significant number of meritorious complaints without an investigation. It would restrict access to justice for many people who have experienced discrimination, including some of the most vulnerable people in NSW. It would also reduce public confidence in the discrimination complaints system, as community members would ask why worthy complaints are being declined without an investigation. Schedule 1[3] is not proportionate to the harm that is caused by discrimination in the community and the sense of alienation that can occur if there is no effective mechanism for raising concerns about discriminatory practices.

Section 89B of the Act already gives the President broad powers to decline a complaint without an investigation. Section 92 gives the President further powers to decline a complaint at any stage of an investigation. The President frequently uses the powers in sections 89B and 92. In 2018-19, the President used those powers to decline in 17.4% of finalised complaints.<sup>3</sup>

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<sup>3</sup> Anti-Discrimination Board of NSW, *Annual Report 2018-19* (2019) 12  
<<https://www.antidiscrimination.justice.nsw.gov.au/Documents/Anti-Discrimination-Board-of-NSW-Annual-Report-2018-19.doc>>.

Concerns about inappropriate complaints could be better addressed by making discrimination tests simpler. This would help the parties to a discrimination complaint and the ADB to work out the merit of a potential complaint at an earlier stage in the process, leading to costs-savings for government. Increased funding for the legal assistance sector would also reduce inappropriate complaints, as lawyers advise clients when they should not make a complaint and help clients to present complaints in a legally appropriate way. Increased funding for the legal assistance sector would therefore lead to costs-savings at later stages in the complaints process, while improving access to justice for people who have experienced discrimination. Greater funding for the ADB would also help strengthen public education around discrimination and provide a more effective preventative strategy.

#### **Schedule 1[4]: Grounds for declining a complaint without an investigation**

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As stated above, the President already has broad powers to decline a complaint without an investigation and broad powers to decline a complaint at any stage of an investigation. Schedule 1[4] would further broaden the power to decline a complaint without an investigation. This would raise due process concerns, restrict access to justice for vulnerable people and reduce public confidence in the discrimination complaints system.

We outline concerns in relation to specific parts of Schedule 1[4] below. In particular, we are concerned that Schedule 1[4] would create significant overlaps in some areas of the law and gaps in protection in others.

#### **Proposed section 89B(2)(f)**

The proposed section 89B(2)(f) would require the President to decline a complaint without an investigation if “the President is of the opinion that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance”. As the merit of a complaint may become apparent only after an investigation has started, the proposed section 89B(2)(f) would likely cause meritorious complaints to be prematurely declined.

Section 89B(2)(a) of the Act already allows the President to decline a complaint without an investigation if “no part of the conduct complained of could amount to a contravention”. Section 92(1)(a)(i) allows the President to decline a complaint at any stage of an investigation if the President is satisfied that “the complaint, or part of the

complaint, is frivolous, vexatious, misconceived or lacking in substance”. The Act already has powerful safeguards against vexatious complaints without adding the proposed section 89B(2)(f). We do not think there is a need to strengthen these provisions – there are sufficient mechanisms for the President to decline vexatious complaints under the current law.

### **Proposed section 89B(2)(g)**

The proposed section 89B(2)(g) would require the President to decline a complaint without an investigation if “the President is of the opinion that there is another more appropriate remedy that should be pursued in relation to the complaint or part of the complaint”. This would be contrary to the general principle that people can choose between lawfully available remedies.<sup>4</sup> There is nothing unique to people who have experienced discrimination that would justify denying them this choice. In any event, section 92(1)(a)(iv) already allows the President to decline a complaint at any stage of an investigation if the President is satisfied that “another appropriate remedy has been, is being, or should be, pursued”.

In KLC’s experience many clients specifically choose a discrimination law remedy over other remedies because of the focus on harm in the conciliation process and an opportunity to voice the impact of discrimination on them. This is especially true for vulnerable complainants. KLC undertook research in this area examining what processes assisted vulnerable complainants in discrimination fora.<sup>5</sup> Where clients have a range of options it is our experience that conciliation processes have a significant impact on their choice of remedy, rather than a strict legal advice about the most legally clear complaint.

The broadening of this provision limits the autonomy of complainants to make decisions about how they wish to seek redress and is inconsistent with human rights principles. It treads a very fine and potentially dangerous line of substituting the President’s view of the best options for that of the complainant. It is not possible for the President to exercise this effectively without an understanding of all the complex reasons personal to the complainant’s position that resulted in the complaint being made.

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<sup>4</sup> See, eg, *Commonwealth v Verwayen* (1990) 170 CLR 394, 421 (Brennan J).

<sup>5</sup> Kingsford Legal Centre, *Having My Voice Heard: Fair Practices in Discrimination Conciliation* (Report, 2018) <[https://www.klc.unsw.edu.au/sites/default/files/documents/2870%20having%20my%20voice%20heard%20report\\_WEB.pdf](https://www.klc.unsw.edu.au/sites/default/files/documents/2870%20having%20my%20voice%20heard%20report_WEB.pdf)>



### **Proposed sections 89B(2)(h) and (i)**

The proposed section 89B(2)(h) would require the President to decline a complaint without an investigation if “the subject-matter of the complaint has been dealt with by the President, an authority of the State or the Commonwealth”. The proposed section 89B(2)(i) would require the President to decline a complaint without an investigation if “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 Commonwealth”.

The proposed section 89B(2)(i) effectively gives the President the power to decline a complaint based on their opinion as to what may be a better avenue for the complainant, even if the complainant has not lodged a complaint elsewhere. It does not provide any guidance as to how this power should be exercised. Given that some Commonwealth discrimination laws will not allow a person to make a complaint if they have already complained elsewhere,<sup>6</sup> this may take away a person’s right to pursue a complaint altogether. It also fails to take into account the personal reasons the complainant may have chosen to lodge a complaint with the ADB over another jurisdiction, for example, faster processing times for complaints.

As noted above, section 92(1) of the Act already allows the President to decline a vexatious complaint or a complaint that “has been, is being, or should be, dealt with by another person or body”. The complexity of discrimination law and underfunding of the legal assistance sector are significant factors in discrimination complaints being made in less appropriate jurisdictions. As a result, the proposed sections 89B(2)(h) and (i) would form a barrier to complaints coming before the most appropriate decision-maker for resolution and restrict access to justice.

Efforts to direct complaints to the most appropriate jurisdiction should focus on setting up a consistent national framework for discrimination protection and guaranteeing increased funding for the legal assistance sector.

### **Proposed section 89B(2)(j)**

The proposed section 89B(2)(j) would require the President to decline complaints about public statements in which the respondent was a resident of another State or Territory or not in NSW at the time the statement was made.

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<sup>6</sup> See, eg, *Disability Discrimination Act 1992* (Cth) s 13.

It is difficult to see a principled basis for the proposed section 89B(2)(j). Discrimination has the same effects on people in NSW, regardless of where perpetrators live or make statements. The NSW Government should not outsource protection of people in NSW to other States and Territories, which may not provide people who have experienced discrimination with an effective remedy in all cases. Consistent with human rights principles, discrimination law should provide remedies where the complainant is affected.

Although the High Court decided in *Burns v Corbett* that NCAT could not exercise judicial power in relation to residents of different States,<sup>7</sup> this does not apply to the President's power to resolve complaints by conciliation or NCAT's power to mediate complaints, as these are exercises of administrative power. The fact that NCAT is constitutionally unable to adjudicate a complaint should not stop people who have experienced discrimination from accessing conciliation or mediation in NSW.

#### **Proposed section 89B(2)(k)**

The proposed section 89B(2)(k) would require the President to decline a complaint without an investigation if "the complaint falls within an exception to the unlawful discrimination concerned".

Section 89B(2)(a) already allows the President to decline a complaint without an investigation if "no part of the conduct complained of could amount to a contravention of a provision of this Act or the regulations". Section 92(1)(a)(ii) allows the President to decline a complaint at any stage of an investigation if the President is satisfied that "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". These sections would cover the kind of situation referred to in the proposed section 89B(2)(k).

In our experience, whether an exception applies is often a matter of contention and argument that requires evidence to be produced as part of the investigation. The use of exceptions needs to be monitored carefully as they represent a curtailing of human rights. We are concerned that this provision has the potential to limit remedies where there are arguable cases as to whether the conduct is covered by the exception. We are especially concerned about the impact for complainants who are legally unrepresented.

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<sup>7</sup> *Burns v Corbett* [2018] HCA 15 (18 April 2018) [1]–[2] (Kiefel CJ, Bell and Keane JJ), [67]–[68] (Gageler J).

### **Proposed section 89B(2)(I)**

The proposed section 89B(2)(I) would require the President to decline a complaint without an investigation if “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”.

This misunderstands the purpose of discrimination law, which is not to punish perpetrators, but rather to protect marginalised people from discrimination and promote equal opportunity within society. Discrimination is harmful, regardless of whether it is intentional.

The question of whether a person’s cognitive impairment “was a significant contributing factor to the conduct” will often be complex, especially as intellectual disability is diverse and exists on a spectrum. The question would require expert evidence and may be the subject of significant dispute, increasing the cost of the complaint process and decreasing accessibility. The President would be poorly placed to consider such questions without an investigation as contemplated by the proposed section 89B(2)(I).

People with a cognitive impairment are protected from discrimination by Part 4A of the Act, which relates to discrimination on the ground of disability. Although discrimination protection for people with a disability can and should be improved, the proposed section 89B(2)(I) is not the right way to do this. It would weaken discrimination protection for marginalised people, including people with a disability, who would face an increased number of declined complaints due to the proposed section 89B(2)(I). We note that people with intellectual disability are far more likely to experience discrimination than to be respondents to discrimination complaints.

KLC has broad concerns about the ways that legal systems interact with people with intellectual disability. We are especially concerned about the accessibility of discrimination law for people with intellectual disability. These issues raise important questions about the harmonisation of rights. They require a systemic outlook and are not well-suited to piecemeal reform like the proposed section 89B(2)(I).

We would welcome greater consultation on how to improve discrimination processes and accessibility for people with intellectual disability with relevant peak bodies such as

the Council for Intellectual Disability. It is certainly the case that legal services for people with intellectual disability as complainants or respondents are extremely limited.

### **Schedules 1[5] and [9]: Complaints that are frivolous, vexatious, misconceived or lacking in substance**

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Sections 89B and 92 of the Act already provide sufficient mechanisms for the President to decline complaints that are frivolous, vexatious, misconceived or lacking in substance. It is unclear how Schedules 1[5] and [9] would change how discrimination works in a practical sense, except to increase the complexity of discrimination law by adding new legal tests.

### **Schedules 1[6] and [7]: Acceptance or declining of complaints by the President during an investigation**

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Schedules 1[6] and [7] would require the President to decline complaints in a broad range of circumstances at any stage of an investigation. This raises similar issues to Schedule 1[3] in terms of due process considerations, restricting access to justice for vulnerable people and potentially impacting on public confidence in the discrimination complaints system. These issues are heightened with respect to complaints in the early stage of an investigations and with respect to complainants who may not have received legal advice.

As noted above, the President frequently uses the powers in sections 89B and 92 of the Act to decline complaints. It is unnecessary and undesirable to require the use of these powers. Concerns about inappropriate complaints could be better addressed by making discrimination tests simpler and increasing funding for the legal assistance sector.

### **Schedule 1[11]: Referral of complaints to Tribunal**

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Schedule 1[11] would remove the path for complainants to seek review before NCAT of the President's decision to decline a complaint under sections 87B(4) and 92.

NCAT review plays an important role in providing due process to complainants and helping to make sure that the right decision is made. Without a path to seek review before NCAT, the only way complainants could seek review of the President's decision to decline a complaint under sections 87B(4) and 92 would be to start a judicial review

case in the Supreme Court of NSW. This is a less accessible, and legally narrow, process that typically requires consideration of complex legal issues.

Many vulnerable people with meritorious complaints would not seek judicial review because they do not pass the complex legal tests for judicial review or are deterred by the inaccessible process. Other people would start judicial review cases in the Supreme Court that could have been more quickly and cheaply dealt with by NCAT. This would add further strain to the under-resourced court system, worsening delays. Furthermore, the Supreme Court is a costs jurisdiction, further increasing the inaccessibility of remedies for complainants. KLC is strongly of the opinion that in the area of discrimination law there needs to be effective remedies in generally no costs jurisdictions.

## Conclusion

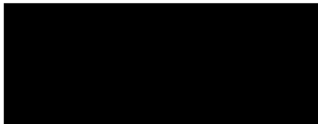
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Although the Bill should be rejected, it highlights the need for a broader discussion about how to appropriately protect people from discrimination in 2020 and beyond. We urge the NSW Government to move towards a consistent national framework that adopts the highest standard of discrimination protection.

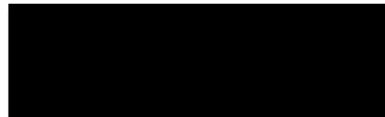
If you have any questions about this submission, please contact Emma Golledge at [legal@unsw.edu.au](mailto:legal@unsw.edu.au).

Yours Faithfully

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