Submission on *Anti-Discrimination Amendment (Complaint Handling) Bill* 2020

1. *On 27* February 2020 the Hon Mark Latham MLC introduced the *Anti-Discrimination Amendment (Complaint Handling) Bill* 2020 into the NSW Legislative Council. The Bill was then referred to the Council's Portfolio Committee No. 5 for inquiry and report. Submissions close on 26 April 2020. This is the submission of Freedom for Faith.

2. Freedom for Faith is a christian legal think tank which is concerned to see the promotion and protection of religious freedom of all Australians. It is led by people drawn from a range of denominational churches including the Australian Christian Churches, Australian Baptist Church Ministries, the Presbyterian Church of Australia, the Seventh Day Adventist Church in Australia, and the Anglican Diocese of Sydney. It has strong links and works co-operatively with a range of other churches and christian organisations across Australia, including many faith based school groups.

Purpose of the Bill

3. The long title notes that the purpose of the Bill is to amend the *Anti-Discrimination Act* 1977 (the Act) to provide clear and reasonable rules for the acceptance of complaints by the NSW Anti-Discrimination Board. The second reading speech delivered by Mr Latham notes the benefits that the Act provides to NSW, but refers to cases where the Act has arguably been misused for political purposes:

> The risk therefore with the Anti-Discrimination Act is one of misuse. If it is too legalistic, too open to vexatious complaints, it can be exploited by political activists for the wrong purpose. It can be used for personal feuds and political campaigns, rather than justice and the fair treatment of citizens.[1]

4. The examples provided in the speech do reveal that this has been a problem in some cases. Mr Latham refers to a series of complaints by Mr Garry Burns, who describes himself as a gay rights activist, against a number of people, including 36 complaints against Mr Bernard Gaynor, a Queensland resident and blogger (23 of which have been referred to the NSW Civil and Administrative Tribunal ["NCAT"] with attendant costs of litigation,[2] although Mr Latham notes that none of the complaints have been substantiated). Mr Burns also made a complaint in December 2019 against the footballer Israel Folau, who had been in high-profile litigation with Rugby Australia over comments he made sharing the Bible's view on homosexual activity on social media. Mr Burns' complaint against Mr Folau was initially accepted by the President of the Anti-

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[1] The Hon Mark Latham MLC, Second Reading Speech; *Legislative Council Hansard*, 27 Feb 2020.

[2] See *Gaynor v Local Court of NSW & Ors* [2019] NSWSC 805 (28 June 2019) at [6] per Harrison J; confirmed in *Gaynor v Attorney General of New South Wales* [2020] NSWCA 48 (26 March 2020) at [2], per Bell P.

Discrimination Tribunal.[3] But since the Bill was introduced, there are press reports that his complaint has now been "declined" following preliminary investigation.[4] The report notes that:

> President of the ADB, Annabelle Bennett wrote to Burns this week "declining" the complaint because it was vexatious and "a flagrant abuse of process such that no further actions should be taken".
>
> Bennett noted that Burns had not pursued the complaint under the state's Anti-Discrimination Act "in order to avail himself of the processes afforded under the ADA," but instead "for a collateral purpose, as a means to pressure the respondent to settle with him".

5. The examples noted above mostly involve complaints of "homosexual vilification" under s 49ZT of the Act. This is an area where there is a clear interaction between rights to religious freedom and religious free speech, and rights not to be vilified or attacked on the basis of sexuality.[5] Freedom for Faith of course supports the general Australian framework of laws prohibiting unjust discrimination on irrelevant grounds, but notes that all such laws contain "balancing clauses" designed to recognise religious freedom.[6] As well as these formal protection provisions, it is clear that the processes by which disputes over these matters are resolved must be conducive to quick and easy resolution. If this is not the case, there will be an obvious "chilling effect" on speech and discussion of topics which may prove in the end to be protected by law, yet as to which a long and drawn-out complaint process may need to be navigated before the outcome is reached. This is especially the case where an understandable desire to allow "access to justice" has led to a rule that costs are not usually ordered against unsuccessful complainants.
6. For these reasons, we generally support (with exceptions noted below) the amendments proposed by the Bill designed to allow the earlier termination of complaints which have no merit, especially where it is obvious from an early stage that a relevant "balancing clause" will operate. It is important to note that similar amendments to the federal discrimination legislation were enacted in 2017 following the report of a mostly bi-partisan Parliamentary committee.[7] (Due to the short time frame required for this submission, it has not been possible to conduct a detailed review of the recommendations and how they have been implemented in federal law. Some parallels are noted below. But we

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[3] See https://www.theguardian.com/sport/2019/dec/13/vilification-complaint-against-israel-folau-accepted-by-nsw-anti-discrimination-board .

[4] See eg M Hitch, "NSW Board Drops LGBTQI Complaint Against Folau" *Star Observer*, April 17, 2020 https://www.starobserver.com.au/news/nsw-board-drops-lgbt-complaint-against-folau/194449 .

[5] For consideration of some of these issues, see Neil J Foster, "Freedom of Religion vs Freedom of Expression: Critical Legal Issues" *Legalwise Seminar, 27 Nov 2019; The Legal Conflict Between Equality, Rights and Discrimination* (2019); available at: http://works.bepress.com/neil_foster/134 .

[6] In NSW, for example, s 56 of the Act, and the provisions of s 149ZT(2)(c), excluding from the prohibition on homosexual vilification a public act "done reasonably and in good faith, for … religious instruction".

[7] See the Parliamentary Joint Committee on Human Rights Inquiry report: *Freedom of speech in Australia-*
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 Feb 2017).

urge the Portfolio Committee to consider these recommendations carefully in its examination of the Bill.)

Complaints under the ADA

7. Before commenting on specific provisions of the Bill, it is worth noting briefly the process that is currently followed for the handling of complaints of unlawful behaviour under the Act, specifically the process for dealing with "vilification" claims. In simplified form, the process is as follows:
    a. A complaint may be lodged under either s 87A "alleging that a named person has, or named persons have, contravened a provision" of the legislation. The complaint is sent to the President of the Anti-Discrimination Board- see s 89A(1).
    b. If such a complaint involves an allegation of "vilification", under s 88 there is a requirement that "each person on whose behalf the complaint is made--(a) has the characteristic that was the ground for the conduct that constitutes the alleged contravention, or (b) claims to have that characteristic and there is no sufficient reason to doubt that claim".
    c. Under s 89B the President makes a preliminary decision to "accept" or "decline" a complaint. Grounds on which a complaint may be declined at this early stage are set out in s 89B(2):

> (2) The President may decline a complaint if--
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> (a) no part of the conduct complained of could amount to a contravention of a provision of this Act or the regulations, or
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> (b) the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint, or
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> (c) the conduct complained of could amount to a contravention of a provision of this Act for which a specific penalty is imposed, or
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> (d) in the case of a vilification complaint, it fails to satisfy the requirements of section 88, or
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> (e) the President is not satisfied that the complaint was made by or on behalf of the complainant named in the complaint.

    d. Importantly, under s 89B(4), "a decision under this section to decline a complaint in whole or in part is not reviewable by the Tribunal."[8]
    e. What is decidedly odd is that there is no explicit statutory requirement, if the complaint is "accepted", for the accused person (the respondent) to be formally notified that an investigation has commenced. Section 89B(3) requires notice to be given to the respondent of a decision to accept or decline a complaint only "if the respondent has been given notice of the complaint".
    f. If a complaint is accepted, the President commences an investigation (s 90). A conciliation conference may be called under s 91A.
    g. Under s 92, the President may decide after an investigation has commenced to "decline" the complaint:

> (1) If at any stage of the President's investigation of a complaint--
>
> (a) the President is satisfied that--

[8] See *Wecker v The Delegate (the decision maker) to the President of the NSW Anti-Discrimination Board* [2014] NSWCA 372 (31 October 2014), confirming that the provision means what it says- NCAT has no jurisdiction to review a decision of the Presie

> (i) the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or
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> (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
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> (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
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> (iv) another more appropriate remedy has been, is being, or should be, pursued in relation to the complaint or part of the complaint, or
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> (v) the subject-matter of the complaint has been, is being, or should be, dealt with by another person or body, or
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> (vi) the respondent has taken appropriate steps to remedy or redress the conduct, or part of the conduct, complained of, or
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> (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
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> (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,
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> the President may, by notice in writing addressed to the complainant, decline the complaint or part of the complaint.

h. This "post-acceptance" decision to decline, as can be seen, may be made on a wider set of grounds that the "preliminary" decision to decline under s 89B noted above. A further key difference, however, is that the decision of the President to decline under s 92 may be the subject of an "appeal" to NCAT under s 93A (technically, a "referral" of the complaint.)
i. There is also the option that the President may "terminate" the complaint under s 92A if satisfied that the matter has been "settled or resolved by agreement"; a s 92A termination may not be the subject of further referral to NCAT. (Presumably this is to avoid someone settling one day and changing their mind the next day).

8. There are other features of the scheme which have not been mentioned, but these seem to be the main ones addressed by the Bill.

Comments on the proposed Bill

9. These are our comments on the proposed amendments put forward by the Bill, followed by some other comments as to how the Act might be amended to better protect the rights of respondents. References to "items" are to numbered items in Schedule 1 to the Bill which amend the Act.
10. **Removal of the right of referral under s 93A**: items [1], [8], [10], [11], [12], and [13] all relate to the major amendment made by item [11] to remove the "right of referral" to NCAT following a "post-investigation" decision by the President to decline a complaint. The *Legislation Review Digest* comment on this proposal sums up well the competing interests at stake here:

> Removing section 93A from the Act would **remove the inconsistency in review rights** for decisions to decline an initial complaint versus decisions to decline a complaint during an investigation. However, there may be reasons for this inconsistency. The Act provides the President with much **broader, discretionary grounds to decline a complaint** during an investigation as compared with a decision to decline an initial complaint. Given the more discretionary grounds by which the President can decline a complaint during an investigation the

right to administrative review may be of greater significance for decisions under this section of the Act.[9]

11. On the one hand, removing the right of referral to NCAT after the President has declined a complaint will mean that a non-meritorious complaint will be more quickly terminated. This will reduce the lengthy and potentially expensive process a respondent will have to endure to see such a complaint finally terminated by NCAT. On the other hand, removal of this right will subject a meritorious complaint to a discretionary decision by the President, one person who may or may not have a full understanding of the issues and who may terminate the complaint unjustly.
12. On balance, despite the potential downsides of continuing proceedings which may have little merit before NCAT, we believe that the right of referral should remain in place. These items are not supported as they stand in the Bill. However, in order to deter frivolous and vexatious complaints, we recommend that, in order for a complaint to be accepted by NCAT after being declined under s 92 by the President, the complainant should be at risk of paying the respondent's costs should the NCAT proceedings result in them failing on the same grounds as the President had relied on in declining the complaint; and further, that a complainant in these circumstances should provide (subject to the court's discretion) security for costs for these NCAT proceedings. We note that a similar recommendation was made by the Federal *Freedom of Speech* report referred to above.[10]
13. **Complaints in more than one jurisdiction**: item [2] removes s 88B, which explicitly allows complaints to be accepted even though the same matter has been the subject of a similar complaint in another forum, either interstate or even within NSW. However, s 88B(2) requires the decision-maker to take the earlier complaints into account. On balance and given the different approach taken in different Australian jurisdictions to discrimination matters, it would seem to be wise to remove s 88B. In fact doing so would not of itself result in a person being unable to make a previously-litigated complaint (unless the section were replaced with an explicit bar on such). But it would send a signal that such matters were not to be regarded as best practice. This item is supported.
14. **Mandatory decision-making by the President**: items [3], [6], and [7] change the wording of a decision-making provision from a broadly discretionary one (using the word "may") to a more definite duty (using the word "must"). So, for example, under item [3] s 89B(2) would be amended so that rather than providing that the President "may" decline a complaint under circumstances set out in s 89B(2), it would provide that the President "must" decline a complaint in those cases. This seems a sensible change. It will not remove any other discretions given to the President in fact-finding or forming a judgment on other grounds, but it does signal that where these exclusionary factors are present the complaint should not proceed.[11] These items are supported.

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[9] See NSW Parliament, *Legislation Review Digest* No 11/57 – 24 March 2020, at p v.

[10] Above, n 7 at rec 21, 3.157.

[11] The word "must" is used very heavily in relation to Presidential decisions in the analogous provision in Federal law, s 46PF of the *Australian Human Rights Commission Act* 1986 (Cth).

15. **Additional factors allowing an early dismissal**: items [4] and [5] provide additional circumstances under which the President must dismiss a complaint. Some of these matters replicate grounds under current s 92 which may be used to decline a complaint once an investigation has commenced; there seems no reason why, if these grounds become apparent at the earlier stage of initial consideration, they should not be used to decline at that stage. One of the additional matters, proposed new para 89B(2)(l) referring to the respondent having a cognitive impairment which has contributed to the conduct the subject of the complaint, seems particularly necessary given the example of Mr Sunol discussed in Mr Latham's second reading speech.
16. However, it is suggested that one of the proposed new paragraphs, para 89B(2)(j), needs further consideration. As it stands this is a ground to decline all discrimination complaints under the Act. However, the criteria it uses (whether public statements were made at a time when the respondent was a resident of another State or Territory and not present in NSW) are really only appropriate in dealing with *vilification* complaints, rather than discrimination complaints generally. It is only in vilification claims that the making of public statements alone can give rise to liability. It is recommended that this paragraph be so limited (or perhaps added as an exception to liability in s 88 so that it is picked up by the ground in proposed para 89B(2)(k).) This will also require deletion or amendment of proposed s 89B(2A). Other than as set out here, the other items mentioned above in para 15 are supported.
17. **Additional matters in considering a post-investigation dismissal**: item [9] adds a number of matters to be taken into account by the President under s 92 in considering whether to decline a complaint once investigation has commenced. These matters all seem appropriate and this item is supported.
18. **Summary**: we *support* items [2], [3], [4] (with a slight amendment noted in para 16), [5], [6], [7] and [9]. We *do not support* item [11] (and the related amendments in items [1], [8], [10], [12], and [13]), but we do recommend conditions be imposed on the right to refer a decision by the President to decline a complaint under s 92 to NCAT, involving a liability for costs and security for costs.

Further possible amendments

19. Finally, we recommend as noted above that the Portfolio Committee consider in detail the recommendations made for improvement in complaint-handling processes under the federal legislation.[12] In particular, though, we note that it seems a major flaw in the current process under the NSW Act that there is no duty on the President to alert a respondent to the fact that a complaint is being investigated, once it has been accepted.
20. We understand of course that there may be some circumstances where an ongoing relationship between a complainant and a respondent in a situation of imbalance in power (such as a junior employee making a complaint against a senior manager) may mean that immediate notification is not desirable. But there should be an onus in favour of notification unless such circumstances apply. We note that s 46PF(7) of the *Australian Human Rights Commission Act* 1986 (Cth) provides as follows in similar circumstances:

[12] See above, n 7.

(7) If the President has decided to inquire into a complaint, the President:

(a) must notify the complaint to the respondent, unless the President is satisfied that notification would be likely to prejudice the safety of a person…

21. A provision of this sort should be included in the Act to ensure that all parties to a dispute have a chance to have their side of the matter heard at an early stage.
22. We thank the Portfolio Committee for the opportunity to comment on these proposals.

Yours faithfully

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