



28 April 2020

Hon Robert Borsak MLC  
Chair, Portfolio Committee No. 5 - Legal Affairs  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Sent by email:

Dear Mr Borsak

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

ACON is NSW's leading health organisation specialising in community health, inclusion and HIV responses for people of diverse sexualities and genders. Established in 1985, ACON works to create opportunities for people in our communities to live their healthiest lives. We appreciate the initiation to contribute a submission on the above Bill currently being reviewed by the Committee.

ACON does not support the passage of this Bill.

Anti-Discrimination NSW, the independent statutory body established in the 1970s to administer the *NSW Anti-Discrimination Act (1977)*, is a vital part of the social infrastructure of New South Wales. Sexuality and gender diverse people have been recognised by Anti-Discrimination law later than some other groups, and for some members of our communities, protections are still lacking. It has been essential for our communities to have recourse to make fair complaints, and have these complaints arbitrated and adjudicated fairly.

We believe that amendments which seek to increase the access to justice for people in New South Wales should be supported and are currently working with organisations such as the Public Interest Advocacy Centre NSW to propose broader reforms to the Act which support this goal. The Bill currently being scrutinised by the Inquiry is drafted in such a way that many in NSW will lose the rights to make valid complaints and have them dealt with in a fair way. We have a primary concern with any change to legislation which removes the discretion of the President of the Anti-Discrimination Board to make determinations in a fair way that considers the needs of each case brought before the Board.

Below, we outline a more detailed explanation of areas of concern within the Bill

**Schedule 1 [2] - The removal of Section 88(b)**

ACON does not support the removal of Section 88B from the Act. Australians interact with services, businesses, governments and individuals across state and federal boundaries (Local Health Districts for example may operate one district across state borders). It is important that recourse be made available to a complainant across the borders of states if the complaint relates to an act of discrimination that occurs in more than one state. The Commission in NSW enacts the NSW anti-discrimination legislation only, and other states have their own models for addressing such complaints. It is vital that each state can decide on the complaint based on their own state laws.

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The removal of the ability for a complainant to make a complaint relevant to New South Wales law only because another state is dealing the complaint using their own laws diminishes the power of the NSW Anti-Discrimination Act and removes a path for recourse about issues that have occurred in New South Wales

### **Schedule 1 [3] – Acceptance or declining of complaints by the President**

ACON does not support the omission and replacement of terms in Section 89B. The independence of the Commission is an integral part of the efficacy of Commission. To mandate that the President must decline a complaint does not allow for the complex and changing nature of discrimination. ACON believes that the President of the Commission must be afforded independence in decision making.

### **Schedule 1 [4] – Additional grounds for declining a complaint**

ACON supports the concept that the President of the Commission may decline complaints, where the complaint is not being made in the best interest of serving justice in New South Wales. It is vitally important that if the Commission is given increased responsibility for determining whether cases should be declined under the guidelines in the Bill, that the President must have the discretion to decline or not decline the complaint. That is, if Schedule 1 [4] is to become law, Schedule 1 [3] must not be legislated.

This is of particular importance in relation to the proposed section 89B(2)(l) which would require the Commissioner to make a determination on the presence, and potential impact of cognitive impairment of an individual.

ACON has some concerns about subsection (j) of the proposed legislation, especially considering the definition provided by the Bill (see Schedule 1 [5] – Section 89B(6)). A public statement which is published in New South Wales (for example in a State or regional based newspaper) but paid for, or made by, a person living outside New South Wales, should be able to be dealt with under NSW legislation, through Anti-Discrimination NSW.

### **Schedule 1 [5] – Determination of Frivolous and Vexatious Claims**

ACON supports the provision of guidelines to the President of the Commission in determining the possible nature of a claim. We believe that the prescriptive nature of the Bill undermines the independence of the Commission and fails to recognise the work of human rights advocates who may have strong reasoning behind continued, and legitimate complaints. The guidelines also fail to consider the ongoing discriminatory actions undertaken by former respondents to complaints. ACON believes that the proposed subsections 89B(5)(a)-(b) are unnecessary. We would suggest that the insertion after Section 89B(4) could simply read:

*The President is to consider before determining that a complaint is frivolous, vexatious, misconceived or lacking in substance, any evidence that the complainant is not acting in the interests of justice.*

### **Schedule 1 [6] – [7] - Acceptance or declining of complaints by the President during investigation**

As previously mentioned, ACON do not support any changes to the legislation which decrease the independence and discretion of the President or the Commission.

### **Schedule 1 [9] - Determination of Frivolous and Vexatious Claims during investigation**

As previously mentioned, ACON believes that the President need only to rely on evidence that the complainant is not acting in the interests of justice to determine whether a claim should continue to be heard or be declined.

### **Schedule 1 [10] (and related consequential amendments) – Referral of complaints to Tribunal**

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ACON does not support any change to the legislation which reduces the rights of a complainant to justice. As such, we do not support the removal of Section 93A.

#### **Schedule 1 [14] - Application of the changes**

ACON supports that any complaints made before the introduction of the legislation will not be affected by the changes.

Further to this submission, ACON would like to endorse the submission made by The Public Interest Advocacy Centre News South Wales (PIAC NSW). We also believe that the Act is overdue for modernization in light of cultural, social and legislative changes since its inception. The Act is no longer a relevant and suitable piece of legislation for New South Wales, and we hope to continue to work with PIAC and the NSW Government to reform the Act.

If you wish to discuss this submission further, please feel free to contact me on [redacted] or via [redacted]. We once again thank you for the invitation to submit to this important inquiry.

Kind regards

Nicolas Parkhill  
**Chief Executive Officer**

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