

Inquiry into Freedom of Speech in Australia

Legal Aid NSW Submission to the
Parliamentary Joint Committee on
Human Rights

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Legal Aid 
NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 women's domestic violence court advocacy services.

Legal Aid NSW has significant expertise in the area of human rights and discrimination, with a dedicated team of human rights specialists in its Civil Law Division. Grants of legal aid are available

for matters concerning breaches of civil liberties, discrimination and matters of public interest.

Issues pertaining to discrimination and human rights and civil liberties regularly arise in the provision of Legal Aid NSW representation, advice and outreach services.

Legal Aid NSW draws on its experience delivering services to clients in the preparation of this submission. Should you require any further information about this submission please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to respond to the Parliamentary Joint Committee on Human Rights' inquiry into Part IIA of the *Racial Discrimination Act 1975* (Cth) and the complaints-handling procedures of the Australian Human Rights Commission ('**the Commission**'). Our response has been informed primarily by the extensive experience of lawyers from our Civil Law Division.

We focus on the second of the Inquiry's Terms of Reference: whether the complaints-handling procedures of the Commission should be reformed.

In summary, Legal Aid NSW does not consider reform of the current complaints-handling process of the Commission to be necessary or desirable. In our experience, the Commission provides an appropriate forum for parties to resolve disputes effectively and efficiently, without resorting to potentially expensive and time-consuming litigation.

Legal Aid NSW has extensive experience advising disadvantaged and vulnerable clients about their legal problems, including discrimination and human rights matters. In nearly all cases, a client's decision to pursue legal remedies will turn on whether they can access timely, inexpensive and effective dispute resolution mechanisms. Without such mechanisms, these individuals may never be afforded the opportunity to pursue well established and important legal rights. Forums such as the Commission enable disadvantaged and vulnerable complainants to ventilate their concerns early and reach a satisfactory outcome. This avoids the burden of litigation to which parties may otherwise resort.

Legal Aid NSW strongly supports dispute resolution models that require mediation or conciliation as a precondition for litigation. In our view, the Commission provides such a service for disadvantage and vulnerable clients.

Legal Aid NSW considers that the *Australian Human Rights Commission Act 1986* (Cth) ("**AHRC Act**") provides adequate safeguards to parties in a complaint to afford natural justice, fairness and handle complaints in a timely manner. In our experience, the practices of the Commission in handling complaints are appropriate and effective in achieving satisfactory outcomes for parties.

Part IIA of the Racial Discrimination Act 1975 (Cth)

Question 1: Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss. 18C and 18D should be reformed.

Legal Aid NSW makes no comment on this term of reference at this time.

Complaints handling processes of the Commission

Question 2 (a): Whether the handling of complaints made to the Commission should be reformed, in particular in relation to the appropriate treatment of:

- i. Trivial and vexatious complaints; and*
- ii. Complaints which have no reasonable prospect of ultimate success*

Legal Aid NSW submits that reform of the existing powers of the Commission to terminate or decline to investigate complaints is unnecessary. Our reasons follow.

The Commission has sufficient powers to terminate complaints

Legal Aid NSW considers that the Commission is appropriately empowered to terminate or decline to investigate complaints.

The Commission has a statutory obligation to assess merit when complaints are lodged. Pursuant to section 46P of the AHRC Act, the Commission must first determine whether the complaint is properly made. Following that preliminary assessment, section 46PH(c) of the AHRC Act empowers the President to terminate complaints if they are “trivial, vexatious, misconceived or lacking in substance”.¹

The term ‘lacking in substance’ has received judicial commentary in various jurisdictions.² We acknowledge that ‘lacking in substance’ has been interpreted to represent a relatively low threshold for complainants. However, we consider this appropriate in light of the nature and purpose of the Commission as a forum whose principal objective is to resolve disputes relatively quickly and without excessive formality.

That said, where a complaint is not supported by at least basic corroborating material, or where alleged conduct is not likely to amount to any kind of unlawful discrimination, the Commission retains the power to dismiss a complaint. In this way, section 46PH of the AHRC Act requires the Commission to justly and fairly balance competing considerations: On the one hand, the provision acknowledges the difficulty which victims of discrimination frequently face in articulating the basis on which they allege the discrimination occurred,

¹ Further, the President can choose not to investigate complaints on similar grounds. See ss.20(2)(c)(ii) and 32(3)(c)(ii) of the *Australian Human Rights Commission Act 1986* (Cth).

² See *Assal v Department of Health, Housing & Community Services* (1992) EOC 92-409 at [78]; *Orfali v Australian Information Commissioner* [2016] FCA 1386 at [37]; *Ebber v The Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455 at 468.

especially in a technical and complex area of law.³ On the other hand, the provision permits the Commission to terminate a complaint which, on any reasonable assessment, has only a remote possibility of succeeding. We submit, however, that the latter power should continue to be exercised cautiously in an alternative dispute resolution setting.

Legal Aid NSW also notes that there is a substantial difference between a trivial or vexatious complaint and a complaint that may have merit but ultimately does not succeed, or whose outcome is “clouded in doubt”.⁴ There are myriad reasons why a claim may not succeed, such as the complainant’s vulnerability, lack of resources or representation, and the complexity of discrimination law generally, where much of the evidentiary burden falls on the complainant. It is important that the Commission afford individuals access to justice where there is merit in their complaint, even before evidence is tendered, admitted and tested. An unsuccessful claim does not equate to an unmeritorious claim.

In our view, the Commission already possesses, and should retain, appropriate powers to adequately manage complaints.

Complainants should have access to formal dispute resolution and legal remedies

It is a foundation of the rule of law that justice must be accessible to all. In recent years, the Federal Attorney-General’s Department and a number of State governments have recognised the importance of access to justice.⁵ We acknowledge that access to justice encompasses more than access to courts to litigate disputes. However, those who have suffered discrimination should have recourse to the courts and formal legal remedies where their complaint, properly made to the Commission,⁶ cannot be resolved through the conciliation process. Restricting the power of the Commission to mediate complaints of substance could risk such claims being precluded from being dealt with by the courts.

It should also be noted that for the minority of complaints that are not resolved by the Commission, the Federal Circuit Court and Federal Court rules contain appropriate protections to manage trivial and vexatious complaints and to ensure that claims with no prospect of success are finalised without unnecessary delay and expense. For instance, the *Federal Circuit Court Rules 2001* (Cth) allow for summary dismissal for frivolous or vexatious claims or abuse of process.⁷ Similarly the courts may order costs or make vexatious litigation orders against a complainant.

³ This has been acknowledged at a state level by the NSW Civil and Administrative Tribunal in *Morgan v University of Technology, Sydney* [2005] NSWADT 194 (19 August 2005) at [44].

⁴ *Assal* at 78, 899-78, 900.

⁵ See for example the Australian Attorney-General’s Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009, Report of the Access to Justice Taskforce; Australian Productivity Commission, *Access to Justice Inquiry Report*, 3 December 2014; Victoria State Government, *Access to Justice Review – Report and Recommendations*, August 2016, Department of Justice and Regulation.

⁶ Complaints made in accordance with section 46P of the AHRC Act.

⁷ *Federal Circuit Court Rules 2001* (Cth) Rule 13.10.

Complainants would benefit from early advice on their legal problems and remedies

Legal Aid NSW would welcome further Commonwealth support for state and territory legal aid commissions and community legal services to provide clients with legal advice about their prospects of success when contemplating a complaint to the Commission.

Discrimination and human rights law is a complex field. By providing community legal education and early advice, organisations like Legal Aid NSW can ensure that complainants may make informed decisions about progressing their complaint. People who are vulnerable and disadvantaged can be helped to lodge claims and navigate through the system with the aim that meritorious complaints are able to be resolved without recourse to litigation.

Greater Commonwealth support for these early intervention and advice strategies may address concerns that gave rise to the current inquiry, and save costs to the courts and all parties involved in complaints under the AHRC Act.

Question 2(b): Whether the handling of complaints made to the Commission should be reformed, in particular in relation to ensuring that person who are the subject of such complaints are afforded natural justice

All parties to a complaint should be afforded natural justice, irrespective of whether the outcome is determined through an alternative dispute resolution process, or by the courts. Natural justice necessitates that a decision maker be unbiased, and that respondents are informed of the case against them and given the opportunity to respond.

Legal Aid NSW considers that the existing Commission processes accord with these key principles of natural justice.

The Commission is not a forum of formal pleadings or evidence. For good reason, the Commission is concerned with the early and cheap resolution of disputes. Legal Aid NSW considers that the statutory functions of the Commission are appropriate in ensuring that the resolution process is fair, open and transparent, and balances the need to protect the privacy of vulnerable complainants.

The Commission's investigation and conciliation process affords respondents the opportunity to reply to complaints and to provide material to the Commission. In this context, an independent conciliator assists only to facilitate discussion and to help the parties identify solutions.

The AHRC Act already contains a number of provisions which safeguard procedural fairness in the complaints process. For instance:

- The Commission must decide whether or not to inquire into a complaint within two-months.⁸ This gives both complainants and respondents certainty that complaints will be preliminarily investigated in an expeditious manner.

⁸ Section 20(3).

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- The President must notify and direct each respondent to attend a conference, if he or she decides to hold one.⁹
 - The person presiding over a conference must ensure that the conduct of the conference does not disadvantage either the complainant or the respondent.¹⁰
 - The Commission and its President are empowered to compel production of information or material relevant to an inquiry.¹¹

Statutory reform that would render the Commission more like a de facto court could undermine the nature and purpose of the Commission's functions, and dissuade people from bringing genuine complaints. It would also risk greater litigation arising from appeals against decisions of the Commission to terminate or dismiss complaints.

Question 2(c): Whether the handling of complaints made to the Commission should be reformed, in particular in relation to ensuring such complaints in an open and transparent manner

Based on Legal Aid NSW's experience and observations, the Commission deals with complaints in an open and transparent manner. In our experience, Commission conciliators maintain neutrality in disputes, and facilitate appropriate discussions between parties with a view to encouraging creative resolutions.

Legal Aid NSW notes however that confidentiality is a cornerstone of alternative dispute resolution (**ADR**). Confidentiality enables parties to meaningfully engage in conciliation, by allowing for frank discussion of the parties' interests rather than fixed legal positions and arguments, which can lead to more efficient resolution of disputes. Unlike in formal litigation settings, conciliation encourages creative and agreeable resolutions to disputes. We note that other Commonwealth forums impose very similar confidentiality requirements in ADR processes.¹² In our view, it is imperative that current provisions safeguarding confidentiality of the Commission's conciliation process should be maintained.

Question 2(d): Whether the handling of complaints made to the Commission should be reformed, in particular in relation to ensuring such complaints are dealt with complaints without unreasonable delay

Based on Legal Aid NSW's experience and observations, current Commission processes are timely and effective, and complaints are handled without unreasonable delay.

From our experience assisting and advising clients in many different ADR forums, such as the Financial Ombudsman Service and the Anti-Discrimination Board of NSW, we see significant value in the quick resolution of complaints. However, Legal Aid NSW submits

⁹ Section 46PJ(3).

¹⁰ Section 46PK(3).

¹¹ For example see sections 21(1) and 46PI.

¹² See for example the Administrative Appeals Tribunal: *Confidentiality in ADR Processes* at <http://www.aat.gov.au/steps-in-a-review/alternative-dispute-resolution/confidentiality-in-adr-processes>

that expediency and efficiency should not come at the cost of appropriate and fair settlements and the parties' satisfaction with mediated outcomes.

The Commission receives and investigates on average 2300 matters each year.¹³ Any consideration of delay should consider:

- the volume of inquiries and complaints received
- the number of complaints/investigation officers employed by the Commission
- the rates of parties' satisfaction with complaint outcomes.

We note the two most recent Annual Reports of the Commission indicate a majority of complaints are finalised relatively quickly, and with high levels of satisfaction by parties:

- In 2014-15, on average, complaints brought to the Commission were finalised within 3.7 months. In that period, the Commission conducted approximately 1,531 conciliations of which 1,101 complaints (72%) were successfully resolved with a high rate of satisfaction.¹⁴
- In the past financial year 2015-16, the Commission received 2,013 complaints of alleged discrimination and breaches of human rights and finalised 1,982 complaints. 98% of complaints were finalised within 12 months.¹⁵
- Where conciliation processes were conducted, 76% were successfully resolved. Of those surveyed by the Commission, 94% were satisfied with the service of the Commission.¹⁶

These figures reflect the experience of Legal Aid NSW that complaints are handled by the Commission in a timely and efficient manner. Conciliation undertaken by the Commission facilitates creative solutions, where our clients have felt heard and matters have been suitably resolved. In our experience, Commission staff are courteous, professional and take all possible steps to progress and resolve the complaint. For instance, in a recent matter, a settlement was reached within three months of the complaint being lodged, and involved implementation of a workplace policy around discrimination, harassment and equal employment opportunities, and associated training. If complaints such as these were not resolved through this process, Legal Aid NSW would, subject to policy, advise and assist complainants in relation to court proceedings. In our experience, these proceedings take much longer to resolve, and come at considerable expense to all parties and the court.

Legal Aid NSW submits that without access to the effective conciliation services at the Commission, the volume of matters before the courts would significantly increase, resulting in increasing costs to all participants and longer time frames for claims to resolve.

¹³ President's opening statement to the *Parliamentary Inquiry into Freedom of Speech* by the Joint Parliamentary Committee on Human Rights, 13 December 2016, <https://www.humanrights.gov.au/news/stories/parliamentary-inquiry-freedom-speech>, and Australian Human Rights Commission, *Annual Report 2015-16*, 2016 pages 26-7.

¹⁴ Australian Human Rights Commission, *Annual Report 2014-15*, 2015 pages 136-7.

¹⁵ Australian Human Rights Commission, *Annual Report 2015-16*, 2016 pages 26-7.

¹⁶ Footnote 16 above.

The high rates of successful resolution indicate the current Commission processes appropriately balance the competing interests of efficiency, finality and client satisfaction. Reform is not needed.

Question 2(e): Whether the handling of complaints made to the Commission should be reformed, in particular in relation to ensuring complaints are dealt with fairly and without unreasonable cost

Based on Legal Aid NSW's experience and observations, complaints to the Commission are dealt with fairly and without unreasonable cost.

The Commission offers a relatively informal process for resolving disputes in which discrimination is alleged to have taken place. In stark contrast to the court system, it does not focus on evidence or technical legal arguments. For this reason, it offers a number of benefits to both parties:

- unrepresented litigants have the opportunity to feel heard
- parties can potentially resolve complaints without the expense and stress of litigation in the federal system, and
- those who are disadvantaged and/or unable to advocate for themselves have an opportunity to communicate their case freely without recourse to technical legal arguments or the burden of procedural rules.

We note that a respondent does not have to incur costs in responding to a complaint, and there is no requirement for legal representation before the Commission.

We are unable to comment on costs incurred by the Commission in handling complaints, but note the Commission has estimated that complaints successfully resolved last year saved 'about \$200m a year in potential Federal Court costs'.¹⁷

Question 2(f): Whether the handling of complaints made to the Commission should be reformed, in particular in relation to the relationship between the Commission's complaint handling process and applications to the Court arising from the same facts

Legal Aid NSW considers that reform of the AHRC Act in relation to the Commission's complaints-handling processes and applications to the courts arising from the same set of facts is not necessary. Section 46PO(3) of the AHRC Act provides appropriate provisions requiring that an application to the courts be substantially the same as an application before the Commission. If a respondent to a claim considers that the complaint to the Commission and the claim before the court are not the same, it can raise this issue for adjudication by the court.¹⁸

¹⁷ President's opening statement to the *Parliamentary Inquiry into Freedom of Speech* by the Joint Parliamentary Committee on Human Rights, 13 December 2016, <https://www.humanrights.gov.au/news/stories/parliamentary-inquiry-freedom-speech>

¹⁸ See *Charles v Fuji Xerox Australia Pty Ltd* [2000] FCA 1531.

Soliciting complaints to the Commission

Question 3: Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited.

Legal Aid NSW is not aware of any practice whereby officers of the Commission or third parties “solicit” complaints to the Commission. We note that the Commission is not empowered to solicit complaints, nor can it initiate a complaint about an act or practice inconsistent with human rights of its own volition.

Legal Aid NSW affirms the paramount importance of community legal education. In our view, it is appropriate that individuals are empowered to exercise their rights and ventilate genuine human rights complaints where they arise. Legal Aid NSW and other agencies in the community justice sector have a mandate to educate and advise the public about human rights and discrimination law.¹⁹ Similarly, Commissioners undertake community education initiatives to ensure that the public understands human rights law, the role of the Commission and complaint mechanisms under the AHRC Act. These activities are consistent with the Commission statutory functions²⁰ and with their powers under individual discrimination laws to promote understanding of and compliance with anti-discrimination legislation.²¹

Legal Aid NSW supports the Commissioners’ consultative and educational activities which protect and promote human rights in the Australian community. When individuals understand their right to lodge a complaint with the Commission, they are more likely to bring genuine and meritorious complaints about acts or practices inconsistent with human rights. Where an individual or client raises circumstances which could give rise to a complaint under the AHRC Act, it is wholly appropriate that they be advised of their right to make a complaint and be assisted to do so.

In our view, the functions and statutory powers which enable Commissioners to educate the public should be preserved.

¹⁹ Legal Aid NSW also has a statutory role to “initiate and carry out educational programmes designed to promote an understanding by the public, or by sections of the public, of their rights, powers, privileges and duties under the laws of New South Wales”: see section 10(2)(m), *Legal Aid Commission Act 1979* (NSW).

²⁰ Section 11 of the AHRC Act.

²¹ See for example s.20 *Racial Discrimination Act 1975* (Cth).

Other reforms to the Commission to better protect freedom of speech

Question 4: Whether the operation of the Commission should be otherwise reformed in order to better protect freedom of speech and, if so, what those reforms should be.

Legal Aid NSW makes no comment on this reference at this time.