



factsheet

Anti-Discrimination Act amendments

The much anticipated amendments to the *Anti-Discrimination Act 1977 (NSW) (ADA)*, passed by Parliament on 26 October 2004, will commence on 2 May 2005.

The latest changes mainly cover the Board's processes and the way we deal with complaints, streamlining the complaints process in a number of important ways.

Time limit extension – Section 89B(2)(b)

The most significant change is the extension of the time limit for lodging complaints. Previously, the Board could only investigate complaints about events that occurred in the six months immediately before the complaint was lodged, unless the complainant could show that there was 'good cause' for the time limit to be extended. The administrative process of showing good cause could add several months to the time it took to investigate a complaint.

Now complainants will have 12 months to lodge a complaint. This brings the ADA into line with Federal legislation administered by the Human Rights and Equal Opportunity Commission.

The President will have the discretion to decline complaints (or parts of complaints) about events occurring more than 12 months before the complaint was lodged.

Part complaints to be accepted – Section 89B(1)

This links to another important change – the President will now be able to accept part of a complaint, whereas before, he or she had to accept or reject complaints in total. This change addresses the situation where complaints allege discrimination on a number of grounds simultaneously, but only some of these are warranted in terms of the legislation – for example they may not be within jurisdiction.

The President will also be able to decline the part of the complaint that is not sustainable without affecting the right of the complainant to pursue other aspects of

the complaint. If the President declines all or part of a complaint prior to investigation, that decision cannot be reviewed by the Administrative Decisions Tribunal (ADT).

Complaints can be lodged by a lawyer – Section 87A(1)(d)

The Board will now be able to accept complaints from lawyers on behalf of their client.

Help for complainants – Section 88A

This section should assist people who face difficulties making a written complaint, for example, somebody with an intellectual disability, or a cognitive disability such as dyslexia, or if they are illiterate, or if they are unable to speak or write English.

These people may be able to get help from Legal Aid, a community legal centre or other community service, but this is not always possible. Under the new amendments, the Board will have a positive obligation to assist people to lodge complaints if it is difficult or impossible for them to do so otherwise.

Power to enforce document supply – Section 90B

The amendments give the Board the power to compel the parties to a complaint to supply information or documents relevant to the complaint; there is a penalty for failure to comply.

The Board believes that the informal and generally cooperative nature of the conciliation process is the best way to facilitate the resolution of complaints. However, parties to a complaint are sometimes reluctant to provide relevant information, and this can hamper the investigation of the complaint and delay its resolution.

Amending complaints after lodgement – Section 91C

People making complaints will be able to amend them after lodgement, for example by adding additional respondents or grounds of discrimination, without affecting the date of lodgement of the complaint.

Of course, a complaint can only be amended if it has not already been declined or otherwise resolved.

Respondents (people or organisations against whom a complaint has been made) must be informed of any changes to the substance of the complaint.

New powers to decline complaints – Section 92

The amendments give the President new powers to decline and terminate complaints during the investigation. As well as the existing power to decline a complaint that is judged to be frivolous, vexatious, misconceived or lacking in substance, the amendments allow a complaint to be declined if there is another more appropriate remedy, for example proceedings for unfair dismissal in the Industrial Relations Commission of NSW.

The President will also be able to decline a complaint if it is decided that the respondent has taken appropriate steps to remedy the problem, such as instituting a new non-discriminatory recruitment policy, or that it is not in the public interest to take any further action, for example when the complaint is extremely trivial.

Other procedural changes

These include:

- a requirement that the Board notify parties to a complaint about the progress of the investigation at least every 90 days (section 90C);
- the ability to register and enforce agreements made in conciliating a complaint (section 91A);
- a mechanism for deeming old complaints to be abandoned – this gives certainty to respondents who may otherwise be wondering about the status of a complaint against them (section 92C). In some circumstances a complaint which has been taken to be abandoned may be revived; and
- a provision for complainants to ask for their complaint to be referred to the ADT if it has not been declined, terminated or otherwise resolved within 18 months (section 93B).

ADT changes – Section 96

Significantly, if a complainant whose complaint has been accepted for investigation and then declined, makes a request that the President refer their complaint to the Tribunal, there is no longer an automatic right to commence proceedings in the Tribunal. Instead, a complainant will have to seek and be granted leave by the Tribunal in order for their complaint to proceed to hearing.

Addressing systemic discrimination – Section 108

The ADA and the processes of the Anti Discrimination Board are directed at redressing specific instances of discrimination through individual complaints. Some have argued that this does not address entrenched or systemic discrimination, which can affect more than just an individual complainant.

Under the amendments, if a complaint goes to the ADT, the Tribunal will have the power to make orders against a respondent if the conduct of the respondent affects people other than the complainant.

The new legislation also empowers the President to enforce orders when systemic discrimination is involved and the individual complainant does not have the resources to bring Tribunal proceedings against the respondent and it appears in the public interest to do so (section 113).

Delegation of powers – Section 94C

Another important change implements the recommendations of the NSW Ombudsman in his report on a complaint against the Board's former President, Chris Puplick.

Previously, many powers could not be exercised by anyone other than the President him or herself. The report recommended that the President should be able to delegate all complaint handling functions other than the power of delegation itself, when necessary, to avoid actual or perceived conflict of interest.

As a final note, the new legislation also paves the way for the electronic lodgement of complaints, although this will not be implemented in the immediate future (section 89A(2)(c)).

The Anti-Discrimination Board of NSW

Sydney

Level 4, 175-183 Castlereagh Street
Sydney NSW 2000
(PO Box A2122, Sydney South NSW 1235)
ph (02) 9268 5555
Enquiries 9268 5544 or 1800 670 812
fax (02) 9268 5500
TTY (02) 9268 5522

Newcastle

ph (02) 4926 4300

Wollongong

ph (02) 4224 9960

website – www.lawlink.nsw.gov.au/adb