

29 September 2023

Hon. Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
By email: nsw-lrc@justice.nsw.gov.au

Dear Mr Bathurst

NSW Ombudsman submission – Anti-Discrimination Act review

I refer to the NSW Law Reform Commission’s review of the *Anti-Discrimination Act 1977 (NSW)* (**ADA**).

The NSW Ombudsman supports the review of this legislation with a view to ensuring NSW has robust, comprehensive and best-practice protections against discrimination, together with appropriate complaint procedures and remedies.

I am making this very brief submission to bring to the Commission’s attention two matters that may be of perhaps tangential or contextual relevance to the review’s terms of reference including, in particular, paragraph 9 (‘the adequacy and accessibility of complaints procedures and remedies’ and paragraph 11 (‘the protections, processes and enforcement mechanisms that exist under...other NSW laws’).

Briefly, these two matters are as follows:

- (a) Separate to the complaint avenue provided by the ADA for complaints about discrimination to be made to the Anti-Discrimination Board, complaints about discriminatory conduct by NSW public authorities and community service providers may also be able to be made to, and investigated by, the NSW Ombudsman, and our jurisdiction in this regard is not confined to the categories of discrimination set out in the ADA.
- (b) The Anti-Discrimination Board (**ADB**) is a NSW public authority for the purposes of the NSW *Ombudsman Act 1974* (**Ombudsman Act**) and as such complaints about maladministration by the Board could be made to, and investigated by, the NSW Ombudsman.

Further information about the first of these matters is set out below. In relation to the second matter, the ADB has not been the subject of any recent complaint to, or investigation by, the NSW Ombudsman.

The jurisdiction of the NSW Ombudsman in respect of discriminatory conduct

The NSW Ombudsman is an independent integrity body that pursues fairness for the people of NSW. We do this by, among other things, receiving complaints and undertaking investigations about the conduct of NSW public authorities and NSW-government funded community service providers.

NSW public authorities include government departments and agencies, NSW statutory bodies, and local councils.¹ The NSW Ombudsman generally does not have jurisdiction to receive or deal with complaints about the conduct of private persons or entities, other than privately managed prisons and those community service providers (such as foster care and other out-of-home-care providers) that provide services under community welfare legislation funded or authorised by the NSW Government.

We have broad jurisdiction to receive complaints about, and to investigate, wrongdoing that may generally be considered 'maladministration'. Section 26 of the *Ombudsman Act 1974* (NSW) (**Ombudsman Act**) sets out those conduct categories of maladministration, as follows:

- (a) *contrary to law,*
- (b) *unreasonable, unjust, oppressive or improperly discriminatory,*
- (c) *in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory,*
- ...
- (g) *otherwise wrong.*

Conduct of a body within our jurisdiction that involves discrimination could constitute maladministration under one or more of the above categories, including in particular:

- the conduct may be contrary to law if, for example, it is contrary to the ADA – noting that 'contrary to law' has a broad meaning under the Ombudsman Act, and is not limited to conduct that would constitute an offence.
- the conduct may be unreasonable, unjust or improperly discriminatory – noting that 'improperly discriminatory' is not defined under the Ombudsman Act, and is not limited to the specific heads of discrimination set out in the ADA.

Complaining about discrimination to the NSW Ombudsman

The NSW Ombudsman aims to be accessible to all complainants. We receive complaints over the phone, in person or in writing including via our online complaint form.

Agencies have their own complaint management systems, and we usually expect people to contact the agency first about their complaint before making a complaint to us. However, if this is hard to do or someone does not feel safe doing this, we will consider the next best steps to help them access complaint mechanisms.

¹ However, there is certain conduct that the Ombudsman is not able to investigate. We cannot investigate conduct of the NSW Police Force for example.

Our services are free to the public. We are fully independent and act impartially in the public interest. People who complain to us are protected under the Ombudsman Act (s 37(4)(a)) if anyone tries to retaliate against them for making a complaint.

We have a range of approaches to address complaints. We can help complainants understand the best way to resolve their complaint directly with the agency and provide information about appeal or review rights and where to seek legal support.

Where the complaint raises concerns about maladministration, we may take action to address the complaint such as:

- making preliminary inquiries (s 13AA)
- conciliating the complaint (s 13A)
- making a 'direct referral' of the complaint to the agency for action under their complaints policy and procedures (only with a complainant's consent and by agreement with certain agencies – complainants are invited to contact us again if the matter remains unresolved)
- making comments to the agency (s 31AC) – for example on how to resolve the complaint and avoid similar situations in the future.

Few complaints result in a formal 'investigation' under the Ombudsman Act. Generally, only those complaints that cannot be resolved otherwise, and that raise serious or systemic concerns, are investigated. When we decide to make the conduct of a public authority the subject of an investigation, we may use coercive powers akin to a Royal Commission. Investigation reports include any findings of wrong conduct – for example a finding that conduct was contrary to law because it contravened the ADA or findings that conduct was unreasonable, unjust or improperly discriminatory. We may also make recommendations for corrective action and system improvement.

Under a recently enacted provision of the Ombudsman Act (s 12A), we now also have the power to refer a complaint about a public authority to that public authority for investigation, with a requirement that the public authority report back to us on the outcome of the investigation.

Complaints within the jurisdiction of the Anti-Discrimination Board of NSW

Where we receive a complaint that falls squarely within the jurisdiction of another office which has a more specific jurisdiction to deal with complaints of that type, and where we consider that that other office would be better placed to deal with a complaint, we may help a complainant by referring the complaint to that other office, rather than taking action on the complaint ourselves.

This includes complaints about discrimination, where it appears that the ADA squarely applies and where the Anti-Discrimination Board appears to be the most appropriate avenue for complaint.

That said, just because a complaint may also fall within the jurisdiction of the Anti-Discrimination Board, that does not mean that the NSW cannot take action on the complaint. That is, complaints within the jurisdiction of the ADB are not excluded from the jurisdiction of the NSW Ombudsman, although as noted as a matter of discretion we may decline to take action on a complaint where we consider that a complaint to the ADB would be the more appropriate alternative means of redress.

Under s 42 of the Ombudsman Act, the NSW Ombudsman can enter into complaint referral arrangements with certain agencies, including the President of the Anti-Discrimination Board.

The *Information sharing and complaint referral Memorandum of Understanding (MOU)* between the NSW Ombudsman and the Anti-Discrimination Board is attached to this submission (**Attachment A**) and also available on [our website](#).

Important guiding principles of the MOU relating to complaints procedures are:

- ensuring that complaints are investigated or otherwise resolved in the most effective manner, and
- so far as possible, complainants should experience ‘no wrong door’ and be assisted, including by referral of their complaint (or part of their complaint) to the most appropriate agency to deal with the matter.

Part 2 of the MOU deals with referral of complaints between the NSW Ombudsman and ADBNSW. It is important to note that complaints are not referred between agencies under the MOU without the complainant’s express consent to the referral.

Complaint examples

Some examples of complaints we have handled that involved concerns about discriminatory conduct include:

- We received a complaint from a young gay person about their youth service caseworker asking them personal questions about their sexual orientation during the intake process. Additionally, the intake form did not provide an option to choose not to respond to questions about sexual orientation. The young person was concerned about disclosing information about their sexual orientation as they had been bullied for being gay in the past.

We made inquiries with the agency, and suggested ways to improve their service delivery. The agency decided to organise training for all staff on how to work with young people who identify as LGBTQIA+. The agency also revised their intake form to ensure their questions are inclusive and non-discriminatory.

- Following an investigation into the disability modification process for public housing tenants we tabled a special report in Parliament titled, ‘Modifying public housing properties to meet the needs of tenants with disability – issues identified through complaints.’²

The investigation examined the experiences of 3 tenants who had requested disability modifications to their homes. We found that the Department of Communities and Justice Housing (DCJ Housing) and the Land and Housing Corporation (LAHC) had unreasonably delayed the completion of the 3 tenant’s disability modification works. We also found, among other issues, that the agencies communicated poorly with the 3 tenants during the process and did not handle their complaints effectively. We made 27 recommendations to DCJ Housing and LAHC to improve disability modification processes. Implementation of those recommendations is being actively monitored.

² NSW Ombudsman report tabled under s 31 of the *Ombudsman Act 1974*, 29 July 2022, <[Modifying public housing properties to meet the needs of tenants with disability - issues identified through complaints. \(nsw.gov.au\)](#)>

- A transgender inmate of a state correctional centre complained to us about a correctional officer continuing to misgender them by addressing them using an incorrect name. Additionally, the correctional centre had not taken action to record the complainant's change of name in their system. We reviewed the policy on transgender and intersex inmates, which stated that transgender inmates are to be addressed by their chosen name and that official records are to be amended to reflect the inmate's identified gender. Following our inquiries, the correctional centre agreed to amend the complainant's details – the complainant also told us that the issue with the correction officer had been resolved.³

Please contact
further information about my office or this submission.

if you require

Yours sincerely

Paul Miller
NSW Ombudsman

³ NSW Ombudsman case study video, 23 August 2023, <[Protecting the rights of LGBTQIA+ community: Michelle's complaint - YouTube](#)>

Information sharing and complaint referral Memorandum of Understanding (MOU) *Ombudsman Act 1974 ss 42, 43*

President of the Anti-Discrimination Board and NSW Ombudsman

What this MOU is about

- 1 This MOU sets out the arrangements made by the President of the Anti-Discrimination Board of NSW and the NSW Ombudsman for:
 - sharing information about the complaints they have dealt with or are dealing with (Part 1 below), and
 - referring complaints to be dealt with by the other (Part 2 below).
- 2 In this MOU, the President and the Ombudsman are referred to as the **Agencies**.
- 3 This MOU constitutes an arrangement under and for the purposes of ss 42 and 43 of the *Ombudsman Act 1974*. Unless otherwise stated, all references to sections are references to the *Ombudsman Act*.
- 4 Nothing in this MOU or the *Ombudsman Act* limits the operation of any other Act that permits or requires the Agencies to share information or refer complaints: ss 42(9) and 43(7).

Purpose and principles

- 5 The Agencies acknowledge the importance of information sharing and complaint referral to support the exercise of their respective functions, including to ensure that complaints are investigated or otherwise resolved in the most effective manner.

- 6 The Agencies agree to apply the information-sharing and complaint-referral authorities given to them under this MOU to mutually support each other in the exercise of their functions. This includes working co-operatively to support the following principles:
 - (a) as far as practicable complainants should experience 'no wrong door' and be assisted through the provision of information about, and if appropriate complaint referral to, the most appropriate agency to deal with their complaint
 - (b) when an Agency receives a complaint (whether or not it is within or partly within its own jurisdiction), it should consider whether it would be more appropriately dealt with by the other Agency
 - (c) to the extent permissible, each Agency should seek to identify and share with the other Agency information that will assist the other Agency to carry out its functions.

Part 1 – Sharing Information

Information the Agencies can share with each other

Ombudsman Act s 43

- 7 Each Agency may share with the other Agency information it has obtained with respect to a complaint it has dealt with.
- 8 Each Agency may also share information about a complaint it is dealing with, by authorising the other Agency to be present during an investigation or hearing conducted with respect to the complaint.
- 9 However, the sharing Agency may only share such information with the other Agency if:
 - a) it is reasonably necessary to assist the other Agency to carry out its functions, and
 - b) where the sharing Agency has reason to suspect, or should have reason to suspect, the information is or includes sensitive personal information about a complainant (see 11 below) – the complainant has expressly consented to the information being shared.
- 10 Information can be shared in accordance with this MOU despite any other Act or law: s 43(3), (4).

How information is shared

- 11 Before sharing information, the sharing Agency will notify the other Agency of:
- a) the general nature of the information it holds, or of the investigation or hearing it is to conduct (without disclosing sensitive personal information about any complainant)
 - b) how it proposes to deal with the information, apart from potentially sharing it under this MOU
 - c) whether it suspects the information is or includes sensitive personal information about a complainant,
 - d) whether there is any law or other obligation restricting the use and disclosure of the information, and
 - e) whether it intends to share the information with any other person or to permit any other person to be present during the investigation or hearing.
- 12 The other Agency that receives such a notice:
- a) may make further inquiries of the sharing Agency for the purposes of determining whether the information should be shared, and
 - b) must advise the sharing Agency whether it wishes the information, or any part of it, to be shared with it including, if applicable, whether it wishes to be present during the relevant investigation or hearing.
- 13 ***Sensitive personal information about a complainant must not be shared without the complainant's express consent.*** Sensitive personal information means information relating to the complainant's:
- ethnic or racial origin
 - political opinions
 - religious or philosophical beliefs
 - trade union membership
 - health
 - sexual activities: s 41

Part 2 – Referring complaints

Complaints the Agencies can refer to each other

Ombudsman Act s 42

- 14 Each Agency may, with the consent of the complainant, refer to the other Agency any complaint it has received if it appears that the complaint is within, or partly within, the other Agency's jurisdiction.
- 15 The referring Agency may refer a complaint to the other Agency:
 - (a) whether or not the complaint is also within or partly within the jurisdiction of the referring Agency
 - (b) whether or not any investigation or other action has been taken, or is proposed to be taken, in relation to the complaint by the referring Agency
 - (c) whether or not the referring Agency has also referred, or proposes to refer, the complaint to any other person.

How complaints are referred

- 16 Before referring a complaint, the referring Agency will notify the other Agency of:
 - a) the nature of the complaint (without disclosing any sensitive personal information about the complainant)
 - b) the basis on which it appears the complaint falls partly or wholly within the other Agency's jurisdiction
 - c) what, if any, steps have been taken in relation to the complaint
 - d) what, if any, steps the referring Agency intends to take in response to the complaint (other than referring it).
- 17 The other Agency that receives such a notice:
 - a) may make further inquiries about the notice for the purposes of determining whether the complaint is within, or partly within, its jurisdiction and should be referred, and
 - b) is to advise the referring Agency whether, in its view, the complaint should be referred.
- 18 No complaint may be referred under this MOU without the complainant's express consent.

Part 3 – General provisions

Other obligations

- 19 Each Agency will ensure that its relevant staff are aware of:
- a) the general types of information that may be relevant to, and of complaints that might be referred to, the other Agency
 - b) the process set out in this MOU for sharing information and referring complaints.

Resolving disagreements

- 20 Any disagreement about the application of this MOU will be referred to the President and the Ombudsman for resolution.

Commencement, review and termination of this MOU

- 21 This MOU commences once it is signed by both Agencies, and replaces all previous MOUs or similar arrangements between the Agencies under ss 42 and 43.
- 22 The Agencies will review the operation and effectiveness of this MOU every three years, or at such other times as may be agreed by them.
- 23 Either Agency may terminate this MOU by giving at least one months' notice in writing to the other Agency.

Public availability of Memorandum of Understanding

- 24 This MOU is open access information under s 6 of the Government Information (Public Access) Act 2009 and is also required to be made publicly available in accordance with s 45. It will be made available on the websites of Anti-Discrimination NSW and the Ombudsman.

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Elizabeth Wing
Acting President of the Anti-Discrimination
Board

Date: 18 January 2022

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Paul Miller PSM
NSW Ombudsman

Date: 19 January 2022