Spinal Injuries
ASSOCIATION

30 January 2012

Assistant Secretary
International Human Rights and Anti-Discrimination Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Dear Assistant Secretary

Re: Submission on the Consolidation of Commonwealth Anti-Discrimination Laws

The Spinal Injuries Association, one of Queensland's longest serving not-for-profit organisations and an advocate for "inclusion", welcomes the opportunity to make a submission regarding the consolidation of Commonwealth anti-discrimination laws.

Initial comment

The Association is strongly in favour of the creation of a consolidated Anti-Discrimination Act. We take the view that Australia could be better served if it had a Commonwealth Anti-Discrimination Act, which would make it easier, in our view, for the community to understand equity and inclusion, because the community would feel the consolidated Act represented them.

Currently, the Association supports its members to take discrimination actions through the appropriate channels. We have found, since our very first engagement in the *Cocks v State of Queensland* matter in 1994, that the *Anti-Discrimination Act 1991 (Qld)* ("QADA") was more favoured by our members than the *Disability Discrimination Act 1992 (*Cth*)* ("DDA"), and indeed almost all of the complaints lodged by members of this Association over the years have been through the Anti-Discrimination Commission Queensland.

It is the Association's hope that the consolidated Commonwealth Anti-Discrimination Act would be written in a simple and direct way with a focus on equity and inclusion, in a similar way to the QADA, so the community feels the Act represents them.

The Association's submission is set out below. The Association has assumed the person(s) reading the submission has knowledge of the Discussion Paper, and will respond to the questions posed in that document.

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Submission

Meaning of discrimination

Question 1
What is the best way to define discrimination?

Direct discrimination and indirect discrimination are separate and different acts so should be defined as different acts in the legislation. Incorporating the two acts into one definition may make the definition more complex. Therefore, the Association recommends continuing to separate the acts in the consolidated Act.

The definition supplied by the Discrimination Law Experts' Group ("DLEG Definition") is one the Association supports and endorses. It is a less complex definition, capable of being read and understood by complainants and respondents alike. The DLEG Definition is certainly favoured over the current definition in the DDA.

Would a unified test for discrimination (incorporating both direct discrimination and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

The Association believes that a unified test for discrimination would not be appropriate, as direct and indirect discrimination are different acts. There is no single test that the Association believes will cover both scenarios.

The Association prefers the 'Comparator test' method for direct discrimination. The reasons are:

The Comparator test includes all the elements of direct discrimination; namely differential treatment, causation, and detriment.

The *Racial Discrimination Act 1975* (Cth) ("RDA") test is too complex, and the current wording used is not simple to understand.

The Detriment test relies on case law to define 'unfavourable treatment'. This is an open term, and is not capable of being read and understood by complainants and respondents alike. A complainant would have to explain why the treatment was 'unfavourable', which would cause too much of a burden on the complainant. It would also likely mean that more complaints end up in the courts, as each side would have a different opinion of what is considered unfavourable. If the test was differential treatment, then it would place the burden of proof on the respondent to show whether or not there was a reason for the differential treatment. It is easier to compare the treatment of a group of people without an attribute to a group of people with an attribute than it is to define 'unfavourable treatment'. This could lead to more settlements out of court.

The Association prefers the *Age Discrimination Act 2004* (Cth) ("ADA") and *Sex Discrimination Act 1984* (Cth) ("SDA") test for indirect discrimination. The DDA test includes a requirement that the complainant does not or cannot comply with the condition, requirement or practice. The situation will arise where a certain person is able to comply with a requirement, but it will cost them more time, money, or effort than it would a person that is easily able to comply. This is not appropriate, as that extra time, money or effort is likely to disadvantage the person attempting to comply. Removing that requirement would make it fairer for all people.

Question 2
How should the burden of proving discrimination be allocated?

The burden of proving discrimination should be based on the UK model as follows:

The burden of establishing a *prima facie* case of discrimination falls on the complainant. If established, the burden shifts to the respondent to establish that there was a legitimate and non-discriminatory reason for the differential treatment or implication of a defence. If established, the burden shifts again to the complainant to prove the reasons are pretexts for discrimination.

This allocation of burden would mean that once a complainant has made a prima facie case for discrimination, the action would be assumed to be discrimination unless the respondent has a legitimate and non-discriminatory reason for the differential treatment. This method is preferred by the Association, as it is clearer to both complainants and respondents alike about the strength of their case, which would allow easier negotiation and cause more settlements to occur out of court during the conciliation process.

Question 3
Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

The Association believes the consolidation bill should include a single special measures provision covering all protected attributes, as long as the provision is clear and easily understood.

An action that promotes equal opportunity is not discrimination so long as it achieves its goal. Therefore, it should be clearly and expressly noted in the consolidated bill that an action that falls under the special measures category is not discrimination.

Question 4
Should the duty to make reasonable adjustments in the DDA be clarified, and if so, how? Should it apply to other attributes?

The Association is a long-time advocate of 'inclusion', and is strongly supportive of creating inclusive communities within Australia. The Association believes the duty to make reasonable adjustments should definitely be included in the consolidated bill, as it

charges the duty holder with a positive responsibility to ensure that all people can participate in the community.

For this reason, the Association believes the provision should not be limited at people with a disability. If a person is independently able to participate in the community, then they should be encouraged to do so as much as possible. A duty to make reasonable adjustments would ensure that Australian governments, businesses, and individuals are creating inclusive communities by making their goods, services, and assets accessible to all people.

Two examples where reasonable adjustments might apply to people without a disability:

Workers who may have had a workplace injury and require reasonable adjustments in some form while they complete their rehabilitation.

The aged workforce who continue to work until age 70-75, which is becoming common in Australia, may require reasonable adjustments to adjust for the possible loss in physical and/or sensory functionality.

Question 5
Should public sector organisations have a positive duty to eliminate discrimination and harassment?

The Association believes that rather than charging public sector organisations with a positive duty to eliminate discrimination and harassment, the consolidated bill should charge all public sector organisations (including local, State and Federal governments and portfolios) with the requirement to report on equity, access and inclusion.

The Association has attempted to draft a provision based on the *Disability Services Act 1993* (WA):

Part (x) –Equity, access and inclusion plans by public sector organisations

(Section) Application of Part

(1) This Part applies to public sector organisations. (Note: in the definitions, public sector organisations will include all local, State and Federal Governments and portfolios)

(2) Notwithstanding subsection (1) regulations may declare that this Part does not apply to a specified public sector organisation.

(Section) Equity, access and inclusion plans

(1) Each public sector organisation must have an equity, access and inclusion plan to ensure that in so far as its functions involves dealings with the general public, the performance of those functions encourages Inclusive Community (Note: Inclusive Community will be

included in the Definitions of the consolidated bill), furthers the principles in Schedule X (Note: see at the end of this provision) and meets the objectives in Schedule Y (Note: see at the end of this provision).

(2) An equity, access and inclusion plan must meet any prescribed State and Commonwealth standards.

(3) A public sector organisation must lodge its equity, access and inclusion plan with the Australian Human Rights Commission –

(a) if the public sector organisation was established before the commencement of the *Consolidated Bill [date of bill]*, without delay;

(b) if the public sector organisation is established after the commencement of the *Consolidated Bill [date of bill]*, within 24 months after the date on which it is established.

(4) A public sector organisation may amend its equity, access and inclusion plan at any time.

(5) A public sector organisation may review its equity, access and inclusion plan at any time.

(6) After reviewing its equity, access and inclusion plan, a public sector organisation must lodge a report of the review with the Commission in accordance with subsection (7).

(7) Not more than 5 years is to elapse –

(a) between the day on which a public sector organisation first lodges its equity, access and inclusion plan with the Commission and the day it lodges a report of a review of the plan with the Commission; or

(b) between the lodgement of the report of one review of its equity, access and inclusion plan and the lodgement of a report and the lodgement of the report of another review of the equity, access and inclusion plan.

(8) After reviewing its equity, access and inclusion plan, a public sector organisation may amend the plan or prepare a new plan.

(9) If at any time a public sector organisation amends its equity, access and inclusion plan or prepares a new plan, whether after a review of not, it must lodge the amended or new

plan with the Commission as soon as practicable (Note: the Association would prefer a more definitive timeframe here) after doing so.

(10) A public sector organisation must undertake public consultation in accordance with the procedure specified in the regulations when preparing, reviewing or amending its equity, access and inclusion plan.

(Section) Report about equity, access and inclusion plan

(1) A public sector organisation that has an equity, access and inclusion plan must, if required to report under State or Commonwealth legislation, include in such report, a report about the implementation of the plan.

(2) A local government or regional local government that has an equity, access and inclusion plan must include in its annual report prepared under State or Commonwealth legislation, a report about the implementation of the plan.

(3) A public sector organisation that –

(a) has prepared or amended an equity, access and inclusion plan in a year ending 30 June; and

(b) is not required to report under subsection (1) or (2),

must make a report about the implementation of the plan to the Commission within 2 months after the end of that year.

(4) The regulations may prescribe information that must be included in a report under subsection (1), (2) or (3) about the implementation of an equity, access and inclusion plan.

(Section) Equity, access and inclusion plans to be made available

A public sector organisation that has an equity, access and inclusion plan must ensure that the plan is made available to the public, by publication in the prescribed manner.

(Section) Public sector organisation to ensure implementation of an equity, access and inclusion plan

A public sector organisation that has an equity, access and inclusion plan must take all practicable measures to ensure that the plan is implemented by the public sector organisation and its officers, employees, agents or contractors.

(Section) Annual report by Commission about plans

(1) As soon as practicable after each 1 July the Commission must give the Minister a report on the effectiveness of equity, access and inclusion plans, and the extent to which they have been complied with, during the year that ended on the preceding 30 June.

(2) The Minister must cause the report received under subsection (1) to be laid before Parliament within 14 sitting days after the Minister receives it.

Schedule X – Principles applicable to all people

1. All people have the inherent right to respect for their human worth and dignity.
2. All people have the same basic human rights and should be enabled to exercise those basic human rights.
3. All people have the same right to realise their individual capacities for physical, social, emotional, intellectual and spiritual development.
4. All people have the same right to services which will support their attaining a reasonable quality of life in a way that also recognises the role and needs of their families and/or carers.
5. All people have the same right to participate in, direct and implement the decisions which affect their lives.
6. All people have the same right to receive services in a manner that results in the least restriction of their rights and opportunities.
7. All people have the same right to pursue any grievance concerning services.
8. All people have the right to access the type of services and supports that they believe are most appropriate to meet their needs.
9. All people who reside in rural and regional areas have a right, as far as is reasonable to expect, to have access to similar services provided to people who reside in the metropolitan area.
10. All people have a right to an environment free from neglect, abuse, intimidation and exploitation.

Schedule Y – Objectives for services and programmes

1. Programmes and services are to focus on achieving positive outcomes for all people, such as increased dependence, employment opportunities and inclusive community [Note: or inclusion in community].
2. Programmes and services are to contribute to ensuring that the conditions of the every day life of all people are the same as, or as close as possible to, norms and patterns which are values in the general community.
3. Programmes and services are to be integrated with services generally available to members of the community.
4. Programmes and services are to be tailored to meet the individual needs and goals of all people receiving those programmes and services.
5. Programmes and services are to be designed and administered so as to meet the needs of all people who experience additional barriers [as a result of their age, gender, disability, aboriginality, culturally or linguistically diverse backgrounds, or geographic location].
6. Programmes and services are to be designed and administered so as to promote recognition of the competence of, and enhance the community perception of, all people.
7. Programmes and services are to be designed and administered so as to promote the participation of all people in the life of the local community through maximum physical, social, economic, emotional, intellectual and spiritual inclusion in that community.
8. Programmes and services are to be designed and administered so as to ensure that no single organisation shall exercise control over all or most aspects of an individual's life.
9. Service provider organisations shall be accountable to all people who use their services, the advocates of such people, the State and the community generally for the provision of information from which the quality of their services can be judged.
10. Programmes and services are to be designed and administered so as to provide opportunities for all people to reach goals and enjoy lifestyles which are valued by the community.

11. Programmes and services are to be designed and administered so as to ensure that all people have access to advocacy support where necessary to ensure adequate participation in decision making about the services they receive or are seeking.
12. Programmes and services are to be designed and administered so as to ensure that appropriate avenues exist for all people to raise, and have resolved, any grievances about services.
13. Programmes and services are to be designed and implemented as part of local coordinated service systems and integrated with services generally available to members of the community. Public sector agencies are to develop, plan and deliver programs and services in a coordinated and pro-active way.
14. Programmes and services are to be designed and administered so as to respect the rights of all people to privacy and confidentiality.
15. Programmes and services are to have regard for the benefits of activities that prevent the occurrence or worsening of disabilities and are to plan for the needs of such activities.
16. Programmes and services are to be designed and implemented to –
    a. consider the implications for the families and carers of all people;
    b. recognise the demands on the families of all people; and
    c. take into account the implications for, and demands on, the families and carers of all people.
17. Programmes and services are to be designed and administered so as to –
    a. provide all people with, and encourage them to make use of, ways of participating continually in the planning, operation and evaluation of services they receive; and
    b. provide for all people to be consulted about the development of major policy, programme or operational changes.

The Association notes the Brisbane City Council, the third largest city council in the world, has implemented an access and inclusion action plan, as has the Sunshine Coast Regional Council - and the Gold Coast City Council has announced it is developing its “inclusion” action plan in 2012.

Protected areas of public life

Question 11
Should the right to equality before the law be extended to sex and/or other attributes?

The Association believes the right to equality before the law should be extended to other attributes, including people with a disability. The Association notes that the consolidated bill must also consider the difficult situations with regard to people with a disability, such as where there is a legal guardian and/or mental health legislation that is contrary to the intention of this provision.

Question 12
What is the most appropriate way to articulate the areas of public life to which anti-discrimination applies?

The Association would like to commend the way in which the Goods and Services provision of the *Anti-Discrimination Act 1991* (Qld) ("QADA") has served the Queensland community. The provision in the QADA is clear, direct and easy to understand for complainants and respondents alike.

The basic concept of the provision in the QADA, is:

(a) if an organisation offers goods or services to persons in a community; and
(b) a person is capable of independently accessing the community;

then, the person referred to in (b) must be able to access the goods or services referred to in (a) without discrimination or barriers to participation.

This basic concept should be kept in mind when articulating areas of public life to which anti-discrimination applies. In other words, if a person is able to access an area that is considered part of public life, then that person should be afforded an opportunity to do so without discrimination or barriers to participation.

Complaints and compliance framework

Question 24
Are there any other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

The Association would like to comment on the Discussion Paper's points 181-184 about extending the current legally binding standards that exist for disability to other protected attributes.

The Attorney-General should be extended the power to make standards addressing the disadvantage facing the aged. There are two reasons for this.

First, there is a parallel between people with a disability, and the progressive diminished functionality that the aged may face as they get older. The diminished functionality can be physical, sensory, and cognitive. Certainly two of the Standards developed under the DDA (Access to Premises and Accessible Public Transport) would be appropriate to extend through to the aged, as the aged and people with a disability would benefit from similar standards in those two areas of public life.

Second, based on current trends, the aged population is continuing to work until 70-75 years of age for the sake of self-funding their retirement (which benefits the national economy) and to fill the shortage of workers due to low birth rates. Extending the Standards to cover the aged would help duty holders adjust for aged workers who may be losing physical and/or sensory functionality.

However, the Association would like to point out that the current DDA standards need to be reviewed and reformed because there are significant shortfalls, and there have been huge technological advances, particularly with regard to the Accessible Public Transport and Access to Premises standards.

Question 25
Are there any changes needed to the conciliation process to make it more effective in resolving disputes?

The Association does not support the idea of making conciliation a voluntary process. In most cases, both parties would be most willing to settle a matter out of court. Compulsory conciliation is a vital opportunity for 'discovery' and clarification of information that assists both sides. It is a good way of getting the two parties together to talk about the issues and possibly come up with a solution that is acceptable to both parties. As mentioned in the discussion paper, the conciliation process is low-cost, informal and flexible. This type of process is therefore, more likely to cause a settlement out of court.

It is noted that one of the points being considered is to retain the compulsory conciliation, but broaden it to include other forms of alternative dispute resolution ("ADR"). If the conciliation process needs to be amended, then this option is the Association's preference, as it still encourages the parties to come together in other low-cost, informal ways to try to resolve the disputes in a way that is satisfactory to both parties.

Question 26
Are any improvements needed to the court process for anti-discrimination complaints?

Representative actions

The Association agrees that allowing representative bodies such as advocacy groups, human rights organisations and trade unions to bring actions in federal courts may possibly make the complaints process more efficient and user-friendly. Systemic

disadvantage is another area where this amendment may help considerably, as it would allow an organisation with experience and knowledge of the complexities of the court system to bring an action on behalf of one or more complainants. It would also help to reduce the stress that a single complainant may face by placing the responsibility on the back of an organisation that has the support of many members.

The final two points made in the discussion paper are also important to consider, and that is that this would allow genuine cases that would not have proceeded past the conciliation process to be heard in the courts; and this in turn would lead to more judicial consideration of important provisions. The requirement that the representative body has a sufficient connection with the subject matter is a fair and important requirement.

Litigation costs

The Association would like to see an amendment to the current system of litigation costs. As mentioned in the discussion paper, currently the unsuccessful party in a litigation matter must pay the costs of the successful party. There are flaws with this system, which we can point out with an example similar to a recent Federal Court decision.

Suppose a complainant brought an action to court, and was able to successfully make out the case for unlawful discrimination. In response, the respondent was able to use the defence of unjustifiable hardship. This would cause a situation where the court agrees that the complainant has been unlawfully discriminated against, but the complainant is still ordered to pay the costs of the respondent, because the complainant lost the case.

In this particular situation it would be preferable for each of the parties to pay their own costs. The complainant has been successful in arguing their case, and the respondent was successful in arguing theirs. The decision shows that the case is not a frivolous one, so neither party has acted unreasonably. In the Association's opinion, the costs in a matter like this should not be paid by the unsuccessful party, especially in the situation where the unsuccessful party is a complainant that has been unlawfully discriminated against.

Thank you for the opportunity to make a submission on this important issue.

If the Association can assist in any way moving forward, we would welcome the opportunity to respond.

Yours sincerely

John Mayo
Executive Manager – Community Relations