Queensland Advocacy Incorporated

Systems and Legal Advocacy for vulnerable people with Disability

1 February 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 Madam/Sir,

Re: Consolidation of Commonwealth Anti-Discrimination Laws

Thank you for the opportunity to contribute to the Consolidation Consultation. We look forward to making further contributions in the future and would appreciate any updates you are able to give us on the Consolidation.

Yours sincerely,

Ken Wade, Director

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1. About QAI

QAI is an independent, community-based, systems and individual legal advocacy organisation. Our mission is to promote and protect the fundamental rights of people with disabilities, extending beyond the defence of civil and political rights to the defence of rights without a legal foundation, rights to self-respect and respectful treatment embodied in the simple quality of human dignity.

We hold ourselves to account by including people with disability as paid staff, in our membership, and in key board positions. Our board members have experience in advocacy, institutional living, community legal services, private legal practice, legal aid, accountancy and community work. QAI is a member of the National Disability Advocacy Network of Australia (DANA) and Combined Advocacy Groups Qld (CAGQ).

As well as its traditional systems advocacy QAI provides individual legal advocacy to people with a disability at risk of human rights abuses, particularly around guardianship and restrictive practice matters, and assists people required to appear before the Mental Health Review Tribunal. We also provide non-legal advocacy to people with disability at risk from the criminal justice system by working with legal and community services that help the person with a disability remain in the community.

We acknowledge that our comments in this submission were developed collaboratively with a number of advocacy organisations and people with disability organisations around Australia.

Summary of Queensland Advocacy Incorporated's Recommendations

1. **Commissioners for each protected attribute should be retained**, together with staff and infrastructure to support them and the parties to discrimination matters.
2. **A preamble** or statement of intent will help the courts interpret the legislation.
3. **Public Interest Standing**: Public interest organisations with a legitimate interest in particular subject matter should be able to commence and pursue discrimination proceedings of behalf aggrieved persons, particularly where claims are indicative of systemic problems.
4. **Burden of proof should shift to the respondent** once *prima facie* discrimination has been established.
5. The consolidated legislation should include a requirement of **equality before the law**. All bills should be required to be non-discriminatory, and ensure that all individuals are treated equally by the law and are afforded equal protection of the law.

Introduction

We applaud the Commonwealth's intention to consolidate, broaden and strengthen these laws. In any revision of the federal anti-discrimination statutes there is a risk of undue emphasis on reducing the regulatory burden on business rather than on promoting equality by guaranteeing effective protection against discrimination. Anti-discrimination legislation is our *de facto* national 'Bill of Rights', and this reform is the government's opportunity to put equality of opportunity on the national agenda.

Queensland Advocacy Incorporated contends that such a significant reform warrants, at least, extensive public consultation and diverse and detailed research, such as the thorough, years-long process of inquiry which preceded the enactment of the *Equality Act* (UK) or the engaging and educative consultation on human rights in 2009. The consolidation can be as much about the process as about the outcome, raising awareness of discrimination and building a national consensus around equality of opportunity in the workplace, in education, in immigration, in health, in social security and in our oldest cultural institutions.

Purpose or Preamble

A purpose clause must set out the underlying equality principles underpinning anti-discrimination law. This will provide more guidance as to how specific legislative provisions should be interpreted, and ensure greater clarity in terms of the substantial values informing the application of such legislation by courts, tribunals and other actors. Any purpose clause should contain strong statements of its substantive aims.- for example:

> **Equal life chances:** Equality duties should aim to break the cycle of disadvantage associated with discrimination, aiming at fair representation, such as in employment or in parliament, and pursuit of equality of outcomes for groups, such as parity in exam results.
>
> **Equal dignity and worth:** Equality duties

Definition of Discrimination

A unified test appears to us to be more effective from a legal point of view, but we see value in retaining the distinction between direct and indirect discrimination.

For non-lawyers, our anecdotal experience is that the idea of indirect discrimination can be hard to understand; but it is of course vital to the legislation, and therefore should be given some explanation by way of examples.

Burden of Proof

A shifting burden of proof serves both natural justice and procedural fairness. Currently direct discrimination complainants must attempt to establish a respondent's motives. Evidence of discriminatory intent is difficult to get when you've been overlooked for a job or denied service provision and have no access to records or to witnesses. Once established evidentiary benchmarks are touched, both process and justice are better served by requiring respondents to prove they did not act in an unlawfully discriminatory manner. A shifting burden of proof has been tested and found workable. Few overseas jurisdictions follow the Australian approach of imposing the full burden on the complainant.

> • In the United Kingdom, European Union and Canada, the burden of proof shifts to the respondent once the complainant has established a *prima facie* case of discrimination.
>
> • In the United States, case law has established a framework of shifting burdens of proof.

A viable three step process would provide that:

1. the plaintiff has the burden of establishing a *prima facie* case of discrimination
2. if the plaintiff establishes a *prima facie* case, the defendant must provide evidence which could support a finding that it had a legitimate and non-discriminatory reason for its action, and
3. if the respondent produces such evidence, the plaintiff must prove the reasons provided by the respondent were pretexts for discrimination.

Access, Standing, Costs[1]

Just over a month ago QAI staff attended the December 2011 combined disability groups meeting of the Queensland Disability Network. Members present were asked whether they had experienced what they believed to be unlawful disability-related discrimination. Everyone present indicated 'yes'.

But when we asked how many present had initiated action under either the State or Commonwealth disability discrimination legislation just one person responded in the affirmative. That person said she had instigated a workplace disability discrimination complaint against the Commonwealth, and that the case had dominated her life for a number of years.

The above is by no means unusual[2] and suggests a deficiency. Legislation is only as good as its application, and the current complaint mechanisms are a deterrent to all but the most determined.

Deterrents to action include:

- the power imbalance (e.g. in the matter referred to above the respondent was a Commonwealth department) and the **attendant emotional stresses** associated with pursuing a complaint; [3]
- the onus on the complainant to initiate and to carry a matter through;
- the difficulty of finding legal representation;
- the complexity and length of proceedings; and
- the possibility - realized, for example, in the recent *King v Jetstar Airways Pty Ltd* (No 2) [2012] FCA 8 (13 January 2012) - of the complainant carrying crippling costs.

There is a strong correlation between socioeconomic status and severe disability.[4] People with disability in particular are less likely to have the financial means to make complaints when there is a risk such as that realised in *King v Jetstar Airways Pty Ltd* (No 2) [2012] FCA 8 (13 January 2012). Sheila King had $20 000 costs awarded against her. The *Sydney Morning Herald* reported that Nicolas Patrick, the chairman of the Redfern Legal Centre, said the Jetstar case highlighted a **huge weakness in discrimination law** which did not allow an organisation to complain on behalf of a group. ''It's left to individuals to run these cases at huge personal and financial risk''. [5]

Yet the alternative may be worse. A recent study by the Victorian Equal Opportunity and Human Rights Commission found that discrimination can lead to increased levels of stress and the internalisation of negative stereotypes and evaluations, which can in turn lead to poor self-esteem and mental health. [6]

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[1] We particularly thank QPILCH for much of the legal research informing this section. Queensland Public Interest Law Clearing House Incorporated . 2005. *Standing In Public Interest Cases* http://www.qpilch.org.au/_dbase_upl/Standing.pdf

[2] See, for example, *Equal Opportunity Review Final Report, An Equality Act for a fairer Victoria*, (June 2008), 142, and comments by Adam Fletcher in the Castan Centre for Human Rights Law blog: "The burden is not just evidentiary either: (Sheila King's experience) in the Federal Court emphasises the dedication and sacrifice required to win a contested discrimination case – particularly against a large corporation. In consultations to date, practitioners and rights advocates have reported that this issue prevents many potentially meritorious cases from proceeding, which is clearly a sign that this aspect of the system requires attention." http://castancentre.com/2011/12/05/rolling-the-federal-anti-discrimination-acts-into-one-great-big-new-law/ .

[3] See for example Standing Committee on Legal and Constitutional Affairs, Report on the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality, (December 2008), [11.50]

[4] See, for example, AIHW, 2009 ' The geography of disability and economic disadvantage in Australian capital cities' Canberra: AGPS, and the ABS report 'Family's with a Young Child with a Disability' http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Chapter4002008

[5] Read more: http://www.smh.com.au/nsw/advocate-to-appeal-decision-on-wheelchair-20120117-1q4sk.html#ixzz1jmI6yoTA

[6] VicHealth, More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee

Public Interest Standing; Representative complaints

There are ways to better distribute the financial and emotional burdens of making a complaint. As the *AHREOC Act* stands, complainants can act individually or as a group, but complaints must be lodged by or on behalf of aggrieved persons [7]

QAI proposes that **the consolidated legislation incorporates a form of public interest standing**. Interested organisations can assume emotional and financial risks on behalf of a class of persons unable/unwilling to bring actions on their own.

- To prevent profit-seeking standing would only be given to organisations with an established interest in the protected attribute, and only in matters where no monetary compensation is sought.
- To deter vexatious litigation such organisations should be potentially liable for their own costs, but to encourage systemic action such organizations should not be liable for respondents'.

Currently the question of who is allowed to bring a discrimination complaint is governed by the AHRC Act, which does in fact permit an organisation to make a complaint on behalf of another person. The sticking point is that if the complaint is unresolved it is extremely difficult for the representative body to proceed - unless the representative body is itself 'aggrieved' by the discrimination. A person has standing only if they have 'sufficient interest' *per* the *Federal Court of Australia Act 1976*.

In *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*, for example, a disability rights organisation lodged a representative complaint of discrimination on behalf of its members in relation to bus stops that allegedly contravened the *Disability Standards for Accessible Public Transport 2002*. But when the organisation attempted to commence proceedings in the Federal Court the Court held that it lacked the required standing to pursue the complaint. The Court held that only an aggrieved person could commence such proceedings, and that whilst the organisation's members may be aggrieved persons, the organisation itself could not be so described.

Standing at common Law

Under the common law, with its focus on private rights, it is difficult for groups to show special damage resulting from an administrative decision. However, under the liberalised approaches, groups have regularly been granted standing. In assessing standing, the courts have considered a range of relevant factors when determining the status of groups. While there is no separate standing test for public interest groups, the courts tend to take these additional considerations into account and therefore, in practice, treat groups distinctively.

Factors considered by the courts when testing the standing of plaintiffs include: [8]

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communities in Victoria, its health consequences, community attitudes and solutions – A summary report
Victorian Health Promotion Foundation, Melbourne, 2007, available at
http://www.vichealth.vic.gov.au/en/Publications/Freedom3from3discrimination/More3than3Tolerance.aspx, p 29.

[7] With the exception that a Trade Union may complain-

46P Lodging a complaint

(1) A written complaint may be lodged with the Commission, alleging unlawful discrimination.
(2) The complaint may be lodged:
(a) by a person aggrieved by the alleged unlawful discrimination:
(i) on that person's own behalf; or
(ii) on behalf of that person and one or more other persons who are also aggrieved by the alleged unlawful discrimination; or
(b) by 2 or more persons aggrieved by the alleged unlawful discrimination:
(i) on their own behalf; or
(ii) on behalf of themselves and one or more other persons who are also aggrieved by the alleged unlawful discrimination; r
(c) by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination.
Australian Human Rights Commission Act 1986

[8] *Onus v Alcoa Of Australia Ltd* (1981) 149 CLR27
• "A plaintiff has no standing to bring an action to prevent the violation of a public right if he has no interest in the subject matter beyond that of any other member of the public" (Gibbs CJ at 36)
• "At least the plaintiff must be able to show that success in the action would confer on him - albeit as a member of a class - a benefit or advantage greater than the benefit or advantage thereby conferred upon the ordinary member of the community; or alternatively that

(a) the representative nature of the group . An important consideration is that the group granted standing is representative of a significant public concern; [9]

(b) an established interest in the area;[10]

(c) the relationship with government; [11]

Examples include:

- the group sits on government boards or committees;
- the group has made past submissions to government in related areas;
- the group is recognised by legislation;
- the government has sought advice from the group;
- the group has received funding from the government.

(d) prior participation in the relevant process. The applicant had some involvement in the relevant process, usually the decision making process itself; [12]

(e) whether there are other possible applicants. A number of judges have indicated that the absence of other possible applicants will favour the grant of standing; [13]

(f) the interest of members. In some cases, the interests of individual members have been taken into account to determine the standing of the group.[14]

(g) the importance of the issues at stake. The perceived importance of the issues at stake is a consideration sometimes expressly or implicitly relied on in establishing standing.[15]

With its long history of disability advocacy, Queensland Advocacy Incorporated is typical of the kind of organisation that could qualify under 'public interest' standing.

Public Interest Standing: Case Studies

There is precedent for this kind of standing even under current Commonwealth anti-discrimination law. In *Executive Council of Australian Jewry v Scully* (1998) 51 ALD 108, an unincorporated Jewish association had standing to bring proceedings against a person who had allegedly distributed anti-Semitic literature, under the *Racial Discrimination Act 1975* (Cth) and the *Racial Hatred Act 1995* (Cth), due to the member organisations being "persons aggrieved" by the alleged actions.

In *Australian Conservation Foundation and Anor v Minister of Resources and Anor* (1989) 19 ALD 70 (ACF No. 2) it was found that ACF had standing to challenge a ministerial grant of a licence for export of woodchips from State forests. Davies J (at 73) said:

> "While ACF does not have standing to challenge any decision which might affect the environment, the evidence establishes that ACF has a special relation to South East forests and certainly in those areas of the South East forests that are the National Estate. The ACF is not just a busybody in this area. It was established and functions with governmental financial support to concern itself with such an issue. It is pre-eminently the body concerned with that issue. If ACF does not have a special interest in the South East forests, there is no reason for its existence.

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success in the action would relieve him of a detriment or disadvantage to which he would otherwise have been subject - albeit as a member of a class - to an extent greater than the ordinary member of the community." (Brennan J at 76

[9] *Australian Conservation Foundation v Minister for* Resources (1989) 76 LGRA 200, 205-206; *Right to Life Association v Secretary, Department of Human Services and Health* (1995) 56 FCR 50, 78-80 (Beaumont J)

[10] *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, 205; *North Coast Environment Council lnc v Minster for Resources* (No. 2) (1994) 55FCR 492, 512-513; Tasmanian Conservation Trust Inc v Minster for Resources (1995) 55 FCR 516,552-553.

[11] *Right to Life* (1994) 52 FCR 209

[12] *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, 205; *North Coast Environment Council inc v Minster for Resources (*No. 2) (1994) 55 FCR 492, 512-513; *Tasmanian Conservation Trust Inc v Minster for Resources* (1995) 55 FCR 516, 552-553

[13] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27,73; *Ogle v Strickland* (1987) 13 FCR 306, 319-32

[14] North Coast Environment Council lnc v Minster for Resources (No. 2) (1994) 55 FCR 492, 512-513; Ex Parte Helena Valley/Boya Association (inc); State Planning Commission and Beggs (1989) 2 WAR 422, 437

[15] Australia Conservation Foundation v Minister for Resources (1989) 76 LGRA 200, 206; King Cole Hobart Pty Ltd (1992) 77 LGRA 92, 100; Central Queensland Speleological Society Inc (1989) 2 Qd R 512, 52

In *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, Sackville J (at [82]), in construing a set of principles from *ACF v Commonwealth* relevant to the present matter, said that an organisation does not demonstrate sufficient special interest in the environment by simply formulating objects that demonstrate an interest in and commitment to the preservation of the physical environment.

In *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs* (SA) (1995) 183 CLR 552, a union was held to have standing because of the special interest held by its individual members.

• In *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2001] FCA 1728, the Court applied *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs* (SA) (1995) 183 CLR 552 in finding that the NAALAS had standing to challenge the validity of the appointment of a magistrate of the Northern Territory.

It had the same interest in the issue as would any of its clients appearing before the magistrate. This was not to say that all practitioners representing a client before the magistrate would have standing: "Such a practitioner cannot be equated with an incorporated body such as NAALAS, which has particular responsibilities towards Aboriginal persons and the Aboriginal community generally. NAALAS occupies a pivotal role in the administration of criminal justice in the Northern Territory."

Open Standing

Arduous process and the threat of costs are powerful disincentives to vexatious action**.** The traditional approach to standing is to determine whether the complainant has a "special interest" in the subject matter of the dispute. This test has also been used to guide standing tests under various statutes, in particular, standing for judicial review where the person must be a "person aggrieved" or a "person affected" by the decision or action in question. However, there has been a broadening of the approach the courts take when considering whether a party has standing to enforce a public right. In Bateman's Bay, Gaudron, Gummow and Kirby JJ suggested a test where "the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process."

Similarly, Chesterman J in the NQCC Case found a person would have standing under the Judicial Review Act 1991 (Qld) if it could be seen that his or her connection with the subject matter was not an abuse of process and that he or she was not motivated by malice, was not a busy body or crank and the action would not put another person to great cost or convenience. Consistent with these views, some environment, planning and consumer protection legislation includes open standing or near open standing provisions, but without formal recognition through statute it is unlikely that a liberal approach would be applied with any uniformity in the near future.

The Australian Law Reform Commission reviewed the law of standing in 1996 and recommended that a broad single test for standing be introduced. The ALRC also recommended that the 'special interest' requirement be removed. It was of the opinion that the test is too narrow, uncertain, complicated, inconsistent and involves making value judgments as to what interests will be recognised. The ALRC has put forward a new general test for standing allowing any person to commence public law proceedings unless:

(a) Relevant legislation provided a clear intention to the contrary; or

(b) It would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of the person having a private interest in the matter to negotiate.

In addition to relieving individuals, representative complaints also have the capacity to produce positive outcomes that reach beyond the circumstances of one individual and lead to the achievement of systemic change and substantive quality.

Costs

The prospect of a costs burden in the event of a failure by a complainant to prove a claim may deter potential complainants from seeking relief under the legislation, which may undermine the primary object of the consolidated Act to prevent and prohibit discrimination. The *Fair Work Act* is a suitable model for the consolidated Act.[16] Under the FWA, a party may be ordered to pay costs in limited circumstances, such as where proceedings were instituted vexatiously or without reasonable cause.

[16] Fair Work Act 2009 (Cth) s57

There is little point in liberalising the law on standing without procedural reforms that would relieve public interst organisations of the potential burden of costs. An adveres finding would have the potential to bankrupt a smaller public interest organisations that have annual budgets ranging from $0 to low six figures. In an address to a conference of the National Environmental Law Association in 1989 Toohey J - formerly a member of the High Court - said:

> Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.[17]

Compliance, Remedies, Research

We recommend that the legislation make provision for the recording and registration of conciliated agreements; the creation of a compliance unit within HREOC to investigate breaches and issue compliance notices, brief prosecutors, commence proceedings where there is non-compliance, offer guidance for compensation where a breach has occurred, and identify systemic issues.

General Recommendations

Disability Discrimination Commissioner:

We strongly support the retention of separate commissioners for each class of protected attribute. Many people with disability appreciate the work of the present Commissioner, Mr Graeme Innes AM, in raising the profile of disability issues on the national agenda, in providing symbolic leadership for the sector, and in raising awareness of the connection between disability rights and Australia's human rights agreements. While we support consolidation we believe that the office of Commissioner is the human face of the legislation; a cheerleader, if you will, and spokesperson for the disability rights movement, and above all a symbol that absent discrimination there is no office beyond anyone's reach. Their Offices, in addition, should be retained in order to consolidate and build expertise in relation to each particular form of discrimination.

Equality before the law:

Equality before the law is concerned with the operation and effects of laws rather than the acts of individuals. Our Federal discrimination statutes are reactive, adversarial and complaints-based, setting up David and Goliath battles which regardless of the issue often fail to stimulate substantive systemic changes.

Because they are reactive, and therefore piecemeal, they fail to identify systemic discrimination. Because they are adversarial they create 'good guy- bad guy' dichotomies often at great personal cost to both complainants, who may be tagged as vexatious or as acting in bad faith, and respondents, who may be unhelpfully painted as uncooperative and unreasonable. A complaints-based regime therefore tends to be negative and narrowly focussed, instead of being constructive and developmental.

One way of addressing this concern is by enacting equality before the law, requiring all laws enacted by the government to be non-discriminatory, and requiring that all individuals be treated equally by the law and to be afforded equal protection of the law.

Protecting the rights to equality before the law and equal protection of the law without discrimination are the focus of Australia's obligations under the International Covenant on International and Civil and Political Rights (ICCPR). Article 26 of the ICCPR states:

[17] Cited in McClelland, 2005 at

> All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The right to equality before the law is also the focus of specific international human rights instruments on which our Federal anti-discrimination laws are based.

- Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (on which the *Racial Discrimination Act* is based).
- Articles 2(c) and 15(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (on which the *Sex Discrimination Act* is based).
- Article 12 of the *Convention on the Rights of Persons with Disabilities*.

The failure to guarantee the right to equality before the law in these Acts represents a significant gap in the protection of human rights in Australia, and has been identified as such by human rights organisations and prominent inquiries over several years. Rectifying this omission would be a significant feather in the cap in the development of the National Human Rights Action Plan.

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