Queensland Advocacy Incorporated

Systems and Legal Advocacy for vulnerable people with Disability

Legal and Constitutional Affairs Committee
Parliament House
Canberra

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,

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Patron: Her Excellency, Ms Penelope Wensley, AO Governor of Queensland

1. About QAI

QAI is an independent, community-based, systems and individual legal advocacy organisation with four programs: a mental health legal service, a human rights legal service, systemic advocacy and justice support. 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

The consolidation bill should present its protected attributes as a non-exhaustive open list.

The *Migration Act 1958* should not be exempt from the effect of the consolidated legislation. Clause 27 should be amended so that Australia's immigration procedures are largely subject to the same human rights scrutiny as domestic ones.

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 person or a class of persons unable/unwilling to bring actions on their own.

The consolidated Act should include effective representative complaints provisions to enable organisations to engage in strategic litigation on behalf of complainants.

The AHRC or an alternative body should be given the power to conduct strategic litigation on behalf of a complainant, to be funded through a strategic enforcement or test cases fund.

The legislation must include provision to encourage more widespread and effective consultation on disability standards.

Insurance, superannuation and credit decisions should not be exempt from human rights scrutiny.

There is little point in liberalising the law on standing without procedural reforms that would relieve public interest organisations of the potential burden of costs.

We recommend that the legislation makes 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.

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, more 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 here in Australia on human rights in 2009. This consolidation could have been as much about the process as about the outcome, raising awareness of discrimination and building towards national consensus around equality of opportunity in the workplace, in education, in immigration, in health, in social security and in our oldest cultural institutions.

Clause 3 – Objects of this Act

We support the strong statement of equality principles and the clear statements of values here. They 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. However, in addition to statements such as 3 (1) (d) that 'promote[s] *recognition and respect* within the community for the principle of equality' the Act should include reference to the establishment of substantive equality targets, 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.

Protected Attributes

The consolidation bill should present its protected attributes as a non-exhaustive open list.

The protection against intersectional discrimination is hampered by adopting a closed list of protected attributes. Previously unprotected attributes may require protection because of unforeseen or changing

circumstances. The legislation should be flexible and capable of recognising unique experiences of discrimination. In *Corbiere v Canada* [1999] 2 SCR 203 the Canadian Supreme Court found that the claimant had been discriminated against on the analogous ground of 'aboriginality-residence'. Aboriginality is recognised as a protected characteristic under the s 15 of the Canadian Charter, residence is not, and it is unlikely that residence alone would be considered a protected characteristic. The Court decided that the unique combination of aboriginality and residence amounted to a protected characteristic because s 15 adopts an open list of protected grounds. Anti-discrimination in Canada and South Africa has afforded protection against intersectional discrimination for many years, letting the courts in those countries respond with appropriate sensitivity to multiple disadvantages, and without any explosion of claims.

The consolidation bill should allow plaintiffs to aggregate evidence of discrimination targeting attributes referring to the intersection of at least two protected attributes.

There are two reasons for implementing this recommendation. First, it would relieve plaintiffs of having to separate evidence according to the protected attributes targeted by the defendant's alleged discriminatory conduct. And second, it would empower those who experience discrimination at the intersection of at least two protected attributes to claim relief even though they may be unable to prove discrimination targeting any one particular protected attribute.

The definitions of discrimination fail to capture certain recognized forms of systemic discrimination.

There are patterns of unfavourable treatment that are not captured by the proposed definitions of discrimination. There may be no intent to discriminate, nor any specific rule, policy or practice that results in disadvantage, but disadvantage occurs nevertheless.

People with intellectual disability experience this form of discriminatory outcome in their contact with the criminal justice system. See, for example, *Disabled Justice* 2007. Police interrogations, although neither directly nor indirectly discriminatory, may lead to false confessions from persons with intellectual disabilities, who are under no obligation to speak to police yet sometimes confess because that is what they believe is expected of them and they want to please. 'Structural discrimination' refers to disadvantages that (1) are caused by the institutional framework of society and that (2) disproportionately affect specific individuals or groups. Policing policies concerning interrogation of persons with intellectual disabilities amount to structural discrimination because the end result is that persons with intellectual disabilities are disproportionately disadvantage as a result of them.[1]

Incidents of this kind are rendered invisible by the consolidation bill because they do not fall under the definition of either direct or direct discrimination. They are unlikely to amount to direct discrimination for want of proof that there was a causal connection between complaint's disability and the discriminatory conduct. And they are unlikely to amount to indirect discrimination because they do not impose a 'condition, requirement or practice' with which the complainant must comply. This is because prospective complainants are under no obligation to furnish information to the police in virtue of their right to remain silent.

Burden of Proof

The proposed legislation's 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

[1] NSW Law Reform Commission (1996b); Disabled Justice Report 2007.

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.

We support this provision in the Exposure Draft

Clause 27 - Exceptions in relation to the Migration Act 1958 (Cth)

Potential migrants and refugees to Australia are currently subject to a health assessment in order to determine their eligibility. The consolidation, as proposed, will not change this. Migrants and refugees with disability are routinely refused entry to Australia and many families supporting people with disability make a difficult decision to leave behind a partner or other family member in order to build a life in Australia. Migrants with disability granted visa status (except for those immigrating on humanitarian grounds) must also wait ten years before being eligible for the Disability Support Pension (DSP) and eligibility for DSP affects eligibility for other programs, such as essential disability services and equipment. As a result, migrants with disability are unable to access appropriate financial support, or a range of services and support that are available to other Australians.

The crux of this section is that it denies potential Australian citizens the anti-discrimination remedies afforded to actual citizens. The Commonwealth cannot be challenged, and it may deny entry to an immigration applicant for fear of the financial burden the applicant might impose on the Australian community. It may deny entry if there is a possibility that the applicant's need for health-care or for community services might prejudice the access of Australian citizens.

Article 4(1)(b) of the ***Convention on the Rights of Persons with Disabilities*** requires Australia as a State party: 'To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'. While reservations to the Convention are expressly permitted (article 46), those which are contrary to the object and purpose of the Convention are precluded.

QAI acknowledges that some forms of discrimination in relation to the *Migration Act 1958* may be necessary in relation to the issue of specific visas. However, we submit that clause 27 should be drafted so that decisions made under the *Migration Act 1958* are not made in a vacuum in relation to the protections such as those provided under the *Convention on the Rights of Persons with Disabilities*.

Whether an applicant is a potential health burden is a question of medical opinion, but as we understand it, assessments are made by a single medical assessor, with no requirement for independent second medical opinion. We are not in a position to judge whether assessments (or the likelihood of 'significant costs') are rationally connected with the policy objective, but it appears that the focus on the cost burden of a person's condition is not balanced by consideration of the positive financial and other contributions which a person may make to Australia if admitted. The protection of the health system alone is in our view not a sufficiently reasonable or objective policy interest to justify differentiation on the basis of disability.

Australia is committed to disability inclusive development aid. We set up a double standard and deny ourselves moral authority when we insist that aid receivers must comply with human rights standards that we are not concerned to meet ourselves. We would add that Australia has recently been admitted to the UN Security Council - and that this failure to commit to basic human rights obligations shows poor leadership.

Clause 39 (5) (b) - Insurance, superannuation and credit and that discrimination is reasonable ' having regard to any other relevant factors'.

Queensland Advocacy Incorporated does not support the inclusion of this section with this wording, which may operate as a 'catch all' for unjustifiable unfavourable treatment of people with disabilities. We believe that even these sorts of for-profit industries should be subject to international conventions, and if not, any unfavourable treatment rather than based in prejudice.

Clause 40 - Defence combat duties etc.: exception for disability

QAI opposes any blanket exception here. People with some disabilities such as the presence in the body of organisms causing disease or illness or the malfunction, malformation or disfigurement of a part of the body do are not necessarily incapable of carrying out combat duties. Discrimination against people with disabilities should only be lawful here to the extent that the disability is incompatible with the inherent requirements of the job.

Clause 71 - Disability Standards

Consultation requirements should go beyond the provisions of the *Legislative Instruments Act 2003*. Effective consultation must be essential to the making of disability standards, compliance codes, temporary exemptions or special measure determinations. Consultations should include at the least: public notice, notice specifically to groups likely to be affected, a minimum period for submissions, and good faith consultation with affected groups in a manner that will enable the affected groups to make their views known.

QAI urges that the legislation should include provisions that the powers set out in clauses 70, 75, 79 and 83 should only be exercised after adequate consultation has allowed those affected, or their representatives, to be informed about the applications and make submissions and present arguments.

Clause 80 - Special Measure Determinations

The process described in clause 80 should be amended to require that:

- before making a determination, the Commission be satisfied that the proposed special measure has been developed in consultation with the people for whose benefit the measure is proposed; and
- before amending or revoking a determination, the Commission be satisfied that the proposed amendment or revocation has been the subject of consultation with the people for whose benefit the measure is in place.

Access, Standing, Costs[2]

Recommendation: The consolidated Act should include effective representative complaints provisions to enable organisations to engage in strategic litigation on behalf of complainants.

Recommendation: The AHRC or an alternative body should be given the power to conduct strategic litigation on behalf of a complainant, to be funded through a strategic enforcement or test cases fund.

Many people with disabilities are deterred from seeking legal remedies because they anticipate that the personal costs - emotional and financial - of seeking those remedies will outweigh the benefits.

On two recent occasions QAI has attended Queenslanders with a Disability Network ('QDN') meetings and asked members whether they had experienced what they believed to be unlawful disability-related discrimination. While everyone present indicated 'yes', only one person had initiated action under either the State or Commonwealth disability discrimination legislation. That person said that build-up to and proceedings in the Federal Court had dominated her life for a number of years.

The above is by no means unusual [3] 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 onus on the complainant to initiate and to carry a matter through;
- the difficulty of finding legal representation;
- the complexity and length of proceedings;
- the possibility such as that realized in the recent *King v Jetstar Airways Pty Ltd* (No 2) [2012] FCA 8 (13 January 2012) - of the complainant carrying crippling costs.
- the power imbalance between applicant and respondent (e.g. in the matter referred to above the respondent was a Commonwealth department) and the attendant emotional stresses associated with pursuing a complaint. [4]

There is a strong correlation between socioeconomic status and severe disability.[5] 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 weakness in discrimination law. The Commonwealth acts do not allow an organisation to complain on behalf of an individual or group of individuals. ''It's left to individuals to run these cases at huge personal and financial risk''. [6]

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[2] 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

[3] 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/ .

[4] 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]

[5] 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

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

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. [7]

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 [8]

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 under section 46P(2)(c) of the *Australian Human Rights Commission Act 1986* (Cth) alleging, on behalf of its members, discrimination 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.

Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council was dismissed by the Federal Court on the basis that the complainant, Access for All Alliance (Hervey Bay) Inc, did not have standing to commence discrimination proceedings in relation to a matter affecting its members. The complaint was made, however, the proceedings in the Federal Court could not continue as representative proceedings because the complainant was not a member of the affected class. This decision effectively brought to an end the prospect

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

[8] 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

of organisations bringing complaints on behalf of affected members or affected people with whom the organisation works.

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 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: [9]

(a) the representative nature of the group . An important consideration is that the group granted standing is representative of a significant public concern; [10]

(b) an established interest in the area;[11]

(c) the relationship with government; [12]

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; [13]

(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; [14]

(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.[15]

(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.[16]

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[9] *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 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

[10] *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)

[11] *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, 205; *North Coast Environment Council Inc 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.

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

[13] *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

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

[15] North Coast Environment Council Inc 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

[16] Australia Conservation Foundation v Minister for Resources (1989) 76 LGRA 200, 206; King Cole Hobart Pty

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.

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."

Ltd (1992) 77 LGRA 92, 100; Central Queensland Speleological Society Inc (1989) 2 Qd R 512, 52

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 inconvenience. 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 Exposure Draft default position is that each party bears their own costs. The court still has the power to make costs orders if it is just to do so, but it must consider the financial position of the parties.

We broadly support the apparent intent of this provision but a decided position depends on how the courts interpret and apply s 133 (2). The prospect of *any* risk of costs, especially where there is no provision for representative complaints, is a robust deterrent to a person who sits on the bottom rung of the socio-economic ladder and who has little or no prospect of ever moving up it.

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.[17] 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.

There is little point in liberalising the law on standing without procedural reforms that would relieve public interest organisations of the potential burden of costs. An adverse finding would have the potential to bankrupt a small public interest organisation running on a typical annual budget in the very 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

[17] Fair Work Act 2009 (Cth) s57.

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.[18]

Compliance, Remedies, Research

We recommend that the legislation makes 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.

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[18] Cited in McClelland, 2005.

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