Question:
One of the findings of the aged care royal commission was the lack of quality/culturally appropriate care for Elders – would a federal Human Rights Act increase the provision of culturally appropriate care for Elders? How would a HR Act assist you and services like yours in advocating for this cohort (if at all)?

Response:
The AHRC proposed model includes cultural rights, including explicit rights for First Nations Peoples.

Cultural rights — First Nations peoples
(1) First Nations peoples hold distinct cultural rights.
(2) First Nations peoples must not be denied the right, with other members of their community—
(a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
(b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and
(c) to enjoy, maintain, control, protect and develop their kinship ties; and
(d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.
(3) First Nations peoples have the right not to be subjected to forced assimilation or destruction of their culture.

The inclusion of this right would allow QAI to effectively advocate for First Nations people with disability in many important ways.

Cultural rights can be used to highlight deficiencies in government service provision and improve practice for the future. For example, following the death of an Aboriginal man with disability in a secure mental health setting in regional Queensland, a Root Cause Analysis (RCA) of the death was conducted prior to the introduction of our Human Rights Act (2019). A subsequent expert report identified the that the RCA did not identify and consider relevant cultural factors. This expert report also found that the RCA excluded human rights factors and excluded the First Nations family as an information source. A human rights framework would now require the identification and consideration of cultural rights in the care of patients, but also in any investigation of the cause of a death.

Under a Federal Human Rights Act, cultural rights contribute to a national dialogue to be considered by States and Territories. It would also be used to inform the development of NDIS plans for First Nations people with disability, so plans are consciously prepared in culturally appropriate ways, and not an afterthought. Accordingly, when applying for access, First Nations people would have greater rights or autonomy to use Indigenous language and assessment tools that are appropriately adapted to fit the cultural need of the individual (participant), family, and/or community. Once NDIS was granted, setting goals, and delivering services would need to take into account the cultural rights of First Nations participants, in matters such as ensuring connection with country and traditional knowledge and beliefs. In essence, to aim and achieve Indigenous self-determination for First Nations peoples who are participants on the NDIS.

A Federal Human Rights Act would allow us to more effectively advocate for clients in this accessing and using NDIS packages that are culturally appropriate and ensure accountability where the right to First Nations cultural rights was not respected. In addition, State laws without equivalent Federal protections, may inhibit our ability to advocate for better laws and policies on a state level in the future, including for plan managed NDIS packages from state based service providers. Thus enable us and strengthen our advocacy efforts for First Nations peoples and even for the broader community.

Question: What are the effective, inclusive, accessible alternatives to the dispute-focused model of resolving human rights complaints? Are there international jurisdictions that are servicing aged/disability care cohort well in this space?

Response: QAI provided submissions to the review of the Queensland anti -discrimination laws on this point. These submissions are found here https://qai.org.au/review-of-the-anti-discrimination-act-1991-qld/ and adapted below.

An enforcement body to make sure anti-discrimination law is followed

The responsibility of eliminating discrimination currently rests entirely with people who have experienced discrimination. This is very onerous and many people give up some way along the long road to justice. We need a proactive, more powerful statutory body that is resourced and empowered to conduct investigations, enforce breaches of the laws, make sure all parties comply with agreed obligations or decisions, and make more rulings and reports. The Australian Human Rights Commission or equivalent body should be given additional powers and resources it needs to take a properly active role in the elimination of unlawful discrimination, sexual harassment and vilification.

A model of enforcement

A model of anti-discrimination enforcement that also includes a strong educational responsibility may be found in the model on which the British Equal Opportunities Commission is based.

Dominique Allen provides a useful comparison of the Australian and (significantly different) British model for enforcement of anti-discrimination laws.[1] Allen notes that in the *Innes v RailCorp* case, if the AHRC had been able to take enforcement action the case may not have been litigated as it would have investigated the complaints and moved to seek enforceable undertakings from RailCorp make system changes which, if not acted upon by RailCorp, would have led to the AHRC would have issued a compliance notice with threat of civil penalty. Unfortunately the AHRC did not have such powers and the litigation burden was borne by the individual. By contrast, when the British Equal Opportunities Commission was first established it was expected to play a major role in enforcing the law in the public interest and given appropriate powers. The system which was developed was based on the framework represented by the equality enforcement pyramid as shown in this figure. (While Allen is discussing this model to be considered at federal level in Australia, it may also provide a model worthy of some consideration for state anti-discrimination entities.)

---

1 Allen, D. 2016. Barking and biting: the Equal Opportunity Commission as an enforcement agency. *Federal law review,* 44**,** 311-335, at 312.

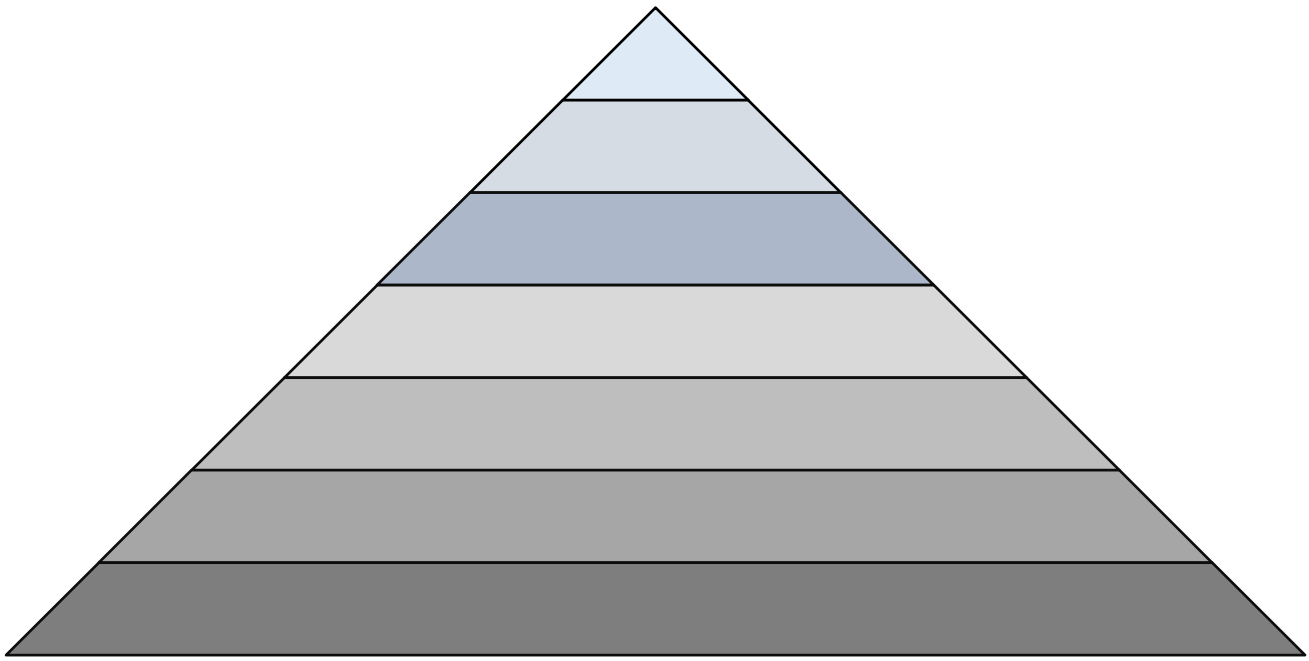

Figure 1 *Equality Enforcement Pyramid*.[2]

Allen explains that the lower two steps of the pyramid indicate where much effort is placed. It should be noted, however, that this model designed to guide enforcement does not include a complaints and conciliation function and other bodies are charged with handling the complaints process.

Allen proposes that dividing the complaint handling and enforcement functions is based on three reasons:

- To ensure that resources allocated for the express purpose of enforcements are not consumed by the complaints handling responsibilities
- To avoid conflict of interest that would arise if the one agency handles both complaints handling and law enforcement
- The existing agency would be re-cast as an enforcement agency sending a strong message.[3]

With this type of model, clarity about which of two agencies can or should be approached by an individual complainant is needed - the agency established to handle complaints through conciliation/dispute resolution

---

2 Based on the work of Hepple, Coussey and Choudhury, cited in Allen, D. 2016. Barking and biting: the Equal Opportunity Commission as an enforcement agency. *Federal law review,* 44**,** 311-335, at 315.

3 Allen, D. 2016. Barking and biting: the Equal Opportunity Commission as an enforcement agency. *Federal law review,* 44**,** 311-335.

or the enforcement agency which is likely in cases of significant public interest to pursue an investigation thus lengthening the time before an individual complainant is likely to see a resolution.

The report from the 2020-2021 review of the Disability Standards for Education found that:

- a common suggestion to address the issues of a lack of consequences and accountability was to have an independent body to handle complaints and to actively monitor providers' compliance with the Standards. This concept was raised by participants across all education sectors. Many participants advocated for this body to audit providers' compliance, with some suggesting that each provider be given a 'score' based on the audit's result. Some participants suggested that the remit of the AHRC be expanded to include this function, or that a new authority be established for this purpose.

- Participants felt that the current complaints-based mechanism used for compliance under the DDA has the effect of addressing individual situations (when issues or complaints are successfully raised and resolved) but does not readily support or drive systemic change. Additionally, proportionally few complaints progress through the formal process, limiting the lessons that can be learnt by the system as a whole.

Recommendations:

- **That the Australian Government consider the option of creating and well resourcing an enforcement body (which may be the Australian Human Rights Commission), having responsibility for anti- discrimination law enforcement and community education, and potentially separating out the function of complaints and conciliation to be handled by a separate entity.**

- **That in developing a stronger enforcement model, resourcing for any additional enforcement initiatives must not deplete resourcing required for ongoing education, training and monitoring functions.**