



Blind Citizens Australia submission: Response to the consolidation of anti- discrimination laws

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About us

Blind Citizens Australia is the peak national consumer body of and for people who are blind or vision impaired. Our mission is to achieve equity and equality by our empowerment, by promoting positive community attitudes and by striving for high quality and accessible services which meet our needs.

Established in 1975, we have over 3100 individual members and 16 branches nationwide in metropolitan, regional and rural locations. Blind Citizens Australia is also affiliated with 13 other organisations that represent the interests of Australians who are blind or vision impaired.

Blind Citizens Australia provides an individual advocacy service, assists individuals with self advocacy and runs systemic campaigns on issues which impact on the participation of people who are blind or vision impaired. We also develop policy and work with all levels of government to improve the rights of people who are blind or vision impaired.

The following submission outlines the viewpoints of people who are blind or vision impaired, including their experiences of the Commonwealth *Disability Discrimination Act 1992*. The comments in this submission are drawn from our expertise as the consumer voice of people who are blind or vision impaired, with specific emphasis on providing the lived experiences of people who are blind or vision impaired. A consolidated list of the recommendations made in this submission can be located in Appendix A.

Disability discrimination and the experience of people who are blind or vision impaired

The introduction of the Disability Discrimination Act (DDA) in 1993 has significantly increased public awareness of issues facing people with disability and lessened the level of discrimination experienced by people with disabilities. Disturbingly, in spite of this increased public awareness, people who are blind or vision impaired across Australia continue to experience high levels of disability discrimination. Anecdotal evidence gathered by Blind Citizens Australia, including disability discrimination complaints lodged by our organisation, suggests that discrimination is most prominent in relation to the following areas:

- access and use of goods, services and facilities
- access to consumer information (such as bills and contracts in accessible formats) and educational information (such as availability of text books)
- denial of access to facilities when using a dog guide
- denial of employment or employment opportunities such as promotions due to the perceived occupational safety risk of hiring a person who is blind or the perceived need to provide additional resources to facilitate the job change.

Despite the prevalence of discrimination experienced, the number of formal complaints of disability discrimination lodged by people who are blind or vision impaired is startlingly low. In 2010-2011, the Australian Human Rights Commission (the Commission) received only

75 complaints of disability discrimination from people who are blind or vision impaired¹. This is compared to estimates that over 480,000 Australians experience vision impairment, with over 50,000 people experiencing blindness².

Whilst not all people who are blind or vision impaired will experience discrimination in their lifetime, the figure of 0.02% is not a realistic appraisal of the extent of discrimination experienced.

Consultation with our members suggests that some of the barriers to lodging a complaint include:

- Lack of knowledge or understanding of the DDA (made more difficult by the use of legal language which is not accessible to most people)
- Lack of knowledge about how to make a complaint and the process of resolving a complaint
- The power imbalance between complainants and respondents
- The complexity and steps involved with progressing a complaint, particularly the time taken from lodgement to resolution. For example, if a person is denied access to a restaurant with a dog guide, they will often take the view that it is simply easier to eat at another restaurant rather than wait 3-12 months to resolve a formal complaint of disability discrimination.
- Inconsistent access in states and territories to free or low cost quality legal or advocacy support to make a complaint
- Not wanting to “make a big deal” about unfair treatment. This is particularly evident in older people who have acquired their sight loss later in life.
- A sense of apathy that the treatment, circumstances or situation will not change or concern that lodging a complaint may make the situation worse, particularly in education and employment
- A feeling of powerlessness, with many individuals telling us that they do not have the energy or means to take on a large company and are “only one person” and therefore not able to influence a systemic outcome.
- Concerns about the cost of pursuing a complaint to the Magistrates or Federal Court and the “fear of being financially sued by the party to recover costs if I lost the case”.

"It is better to have a job with a good income, than to just be in the right". Female, WA

"I made a DDA claim in 1997 after I was wrongfully dismissed from my job working in disability advocacy in QLD. The process was harrowing. I'm not sure I'd put myself through that again. I had to find my own support to deal with the process. After my experience I totally understand why people don't make claims. Basically I felt like I was guilty and had to prove my innocence whilst the opposing party slandered me",
Female, regional Victoria

¹ Australian Human Rights Commission, 2011, *Annual Report 2010-2011*, Appendices 2 available from www.hreoc.gov.au/about/publications/annual_reports/2010_2011/appendices2.html

² Access Economics, 2004, *Clear Insight - The economic impact and cost of vision loss in Australia* available from http://www.cera.org.au/uploads/CERA_clearinsight.pdf

It is apparent that the current system, which requires individuals who have experienced discrimination to retro-actively lodge a complaint, is failing the very individuals it is designed to support. As one member put it,

“The system as it stands is designed around financial status. If a person has nothing to lose in the financial space or has the funds to contract services to greatly improve their chances of winning the case, then I believe [they] will proceed with a case to court level. A person who has an average income with a family, mortgage etc will think twice before going the extra mile”. Male, NSW.

Meaning of Discrimination (Questions 1-6)

What is the best way to define discrimination?

Blind Citizens Australia recommends the development of a clear definition of discrimination, which better aligns with the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD). The UN CRPD includes a single definition of discrimination which does not make a distinction between direct and indirect discrimination. The test focuses on whether a person’s human rights are able to be ‘recognised, enjoyed and exercised, on an equal basis with others’. This definition appears to more closely align to a detriment test of disability discrimination which considers how a person’s rights have been impacted.

As the discussion paper outlines, determining discrimination on the basis of a comparator – who may be a real or conceived person – can be unnecessarily problematic for both people with disability and the court system. As outlined in the Australian Federation of Disability Organisations (AFDO) submission, the use of a comparator does not take into account the accumulated disadvantage associated with disability, such as lower educational and employment outcomes and higher rates of poverty and social exclusion, which are harder to build into a comparator system.

If a unified test for discrimination is developed, it is imperative that the test accounts and allows enough scope for the consideration of subtle and indirect discrimination and will need to cover all conduct currently prohibited under indirect discrimination.

Recommendation 1: Blind Citizens Australia supports Recommendations 7 and 8 of the Australian Human Rights Commission (the Commission’s) submission (December 2011) which recommends consideration of a unified test for discrimination and use of a detriment test, in place of a comparator test.

Recommendation 2: Blind Citizens Australia supports the inclusion of a “characteristics extension” clause which covers imputed assumptions about a person’s disability (such as assumptions about the capacity of a blind parent to ensure that their child is safe) which may lead to discriminatory conduct.

How should the burden of proving discrimination be allocated?

The burden of proof is one of a number of significant hurdles impacting on the use of disability discrimination complaints by people with disability.

Often people who experience disability discrimination, particularly indirect discrimination will not have the “hard proof” to support their claim. Disability discrimination in employment recruitment is a prime example: individuals who are blind or vision impaired who would appear to be well skilled and suited for a role may not be offered a position. In these instances, it is incredibly hard to “prove” that a person has been denied employment on the basis of their disability and not because they were not suited to the role or were not the preferred candidate. Complaints of disability discrimination in employment where there has been clear evidence of discrimination are less common. Even then, it can be difficult to obtain a resolution at conciliation.

Case study: Emma* applied for a role as a community counsellor and attended an interview, where she was asked specific questions about how she would be able to meet the inherent requirements of the role. Emma outlined her use of adaptive equipment and provided examples of how she had successfully completed other similar roles with adjustments. According to Emma, the interview went very well. Two days after interview, Emma received an email from one of the interview panellists advising that she was very impressive at interview, but that the office was not currently set up to include the specific resources needed for her and that a manager would be approached to look into this. The panellist stated that she hoped that Emma would get a position with the organisation in the future but that they could not offer her the advertised position. Despite clear evidence of discriminatory conduct on the basis of disability, the conciliation of this matter was drawn out. After stressful negotiations, the Respondent agreed to provide a written apology without admission of guilt and implement disability awareness training for staff. Emma’s request for compensation was completely disregarded despite loss of income, stress and effects on her personal health.

The overwhelming majority of disability discrimination cases supported by Blind Citizens Australia have settled during the conciliation stage. Whilst many matters have resolved amicably, a significant number of complaints have been withdrawn or resolved simply to avoid the costs of taking the matter to the court system.

Recommendation 3: Blind Citizens Australia recommends that a reverse burden of proof (ie. onus on the Respondent to prove that discrimination has not occurred) should be considered once a prima facie case of discrimination has been demonstrated.

As outlined by AFDO in their submission, if the burden of proof is not fully shifted then a staggered burden of proof system should be investigated which

- compels respondents to provide information where it is clear that the information is at their disposal
- give complaints accessible (both in language and format) information about why a Respondent does not see their action as discriminatory

Should the consolidation bill include a single special measures provision covering all protected attributes?

Blind Citizens Australia asserts that special measures should be extended to all attributes.

Recommendation 4: Blind Citizens Australia supports the continued recognition of special measures and supports its extension to other protected attributes.

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

Blind Citizens Australia agrees that the definition of “reasonable adjustment” and its practical implementation requires further clarification.

Whilst the DDA is the only Act to contain an explicit duty to make reasonable adjustments, the current process of negotiating and implementing reasonable adjustments is at best ad-hoc. This is most noticeable in employment and education settings, where students and people who are blind or vision impaired may be encouraged to choose cheaper, but less effective, modifications or experience delays in the application and purchase of modifications. This can significantly impact on a child’s learning, the hiring of a jobseeker and the productivity of an employee in the workplace.

What is “reasonable” can also be subjective. Blind Citizens Australia is aware of many instances where modifications which have been assessed as necessary for a student have been significantly delayed or not purchased. Unnecessary restrictions on how and where the equipment can be used – with some schools advising students that their laptop is only for use “during school hours” – also compromises the effectiveness of a reasonable adjustment. The financial cost of modifications – even where the costs are small – can regularly trump the efficiency and learning benefits that a reasonable adjustment can provide.

“The education department is refusing to teach my son Braille. My son only has vision in one eye, and in that eye he is legally blind. The education department says that he does not need Braille for year 1 books and that they are not obliged to teach him Braille at the moment.”

Recommendation 5: Blind Citizens Australia recommends clarification of the current definition of reasonable adjustments to ensure clarity for all parties. Guidelines should also be developed about the process to provide reasonable adjustments including clear parameters about assessment and approval of the needs for adjustments, timeliness and flexibility in the use of adjustments (ie. removal of unnecessary restrictions).

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

The current status quo requires public sector bodies and institutions to “not-discriminate” rather than take a proactive or positive duty approach in increasing equality. Current

discrimination law places the onus on individuals with disability to lodge complaints of unlawful discrimination at their own personal and financial cost after the alleged discrimination has occurred. Moreover, as there is no systemic form of redress, the alleged discriminator can theoretically continue their discriminatory practice as long as it is not against the same individual.

The discussion paper noted concern that employers in the private sector “may not know exactly what their legal obligations to implement positive duties and how to comply with them”.

Recommendation 6: As part of the development of the consolidated Act, Blind Citizens Australia recommends the development of education campaigns outlining practical strategies to comply with the Act. Blind Citizens Australia also recommends the development of resources and guidelines which support and provide guidance to employers about how to comply with new requirements.

Useful examples are the resources developed by the Victorian Equal Opportunity and Human Rights Commission focusing on disability and employment, with resources specifically for employers and employees with disability.

The requirement for positive duties should also be extended to organisations that receive funding from public sector bodies, such as government authorities and departments, to ensure that actions are inclusive and equitable.

Recommendation 7: Blind Citizens Australia recommends the extension of positive duties to organisations in receipt of funding from public sector organisations.

Should the prohibition against harassment cover all protected attributes?

Blind Citizens Australia supports the prohibition of harassment against all protected attributes.

Recommendation 8: Blind Citizens Australia supports Recommendation 18 by the Commission which recommends that harassment on the basis of any protected attributes should be unlawful in an area of public life covered by the legislation.

Protected attributes (Questions 7-10)

Associates

Blind Citizens Australia supports the recommendation to extend coverage of the associate provision to other protected attributes. As part of the proposed consolidated Act, Blind Citizens Australia would also welcome redress of an anomaly within the *Disability Standards for Education 2005*.

A key area where the Standards remain silent is the coverage of associates (namely parents) with disabilities who support children with disability and associates with disability who care or support children who do not have a disability. It is well recognised in education literature that a child's learning needs to be reinforced by parents within the home. Many parents who are blind or vision impaired have experienced clear discrimination when trying to access materials in accessible formats such as school newsletters, student reports, permission slips, information on noticeboards and all other printed material supplied to parents. A number of our members have noted that they have experienced complete disregard and, at times, hostility to the provision of any reasonable adjustments to facilitate a parent's use of facilities, such as providing verbal information as to where the child's school bag is hung, arranging an alternative pick up point etc.

Many note that they feel like their child is experiencing a double disadvantage.

Whilst the DDA would arguably provide coverage to parents with disability, this once again places the onus on the individual to make a complaint. As recommended earlier, Blind Citizens Australia sees merit in the development of a public campaign regarding the Act and the Standards and their applicability.

Recommendation 9: Blind Citizens Australia supports the recommendation to extend coverage of the associate provision to other protected attributes.

Recommendation 10: Blind Citizens Australia recommends the inclusion of a clause which specifies that associates with disability who support a child with or without disability are entitled, under the consolidated Act, to reasonable adjustments to accommodate their disability and facilitate their child's learning.

Intersectional Discrimination

Consultation with our members has indicated that individuals can be uncertain about the pathway of lodging a complaint when they experience multiple instances of discrimination across different attributes. This can normalise discrimination for individuals and make it difficult for people to pick just one attribute to complain about.

Recommendation 11: Blind Citizens Australia supports Recommendation 22 in the Commission's submission which recommends coverage of intersectional discrimination, specifically that the proposed law apply to discrimination based on one or more protected attributes or a combination of protected attributes. We also support Recommendation 25 that coverage of the Act should apply to any area of public life.

Protected areas of public life (Questions 11-19)

Protection of voluntary workers from discrimination

Blind Citizens Australia recommends that the consolidated Act include protection of voluntary workers. Many people who are blind or vision impaired rely on volunteer work to

build up the necessary skills and work experience to gain paid work. We are aware of many instances where volunteering opportunities have been denied to a person who is blind or vision impaired due to perceived risks around occupational health and safety – despite research concluding that people with disability are significantly less likely to have a workplace accident³ – or presumptions about how the volunteer will complete the tasks associated with a position.

We also disagree with the assertion that the protection of volunteers would place an unreasonable burden on organisations with a significant volunteer workforce – an organisation which is legally obliged to provide a safe work environment for employees under the current law will have the knowledge and capacity to provide an environment free of harassment and discrimination for employees and volunteers.

Recommendation 12: Blind Citizens Australia recommends that proposed consolidated Act include protection of voluntary workers.

Sport

Whilst the inclusion of people with disability within the community has increased, many people who are blind or vision impaired continue to be treated less equitably in their pursuit of sport and recreation. From a young woman wanting to join her local gym, to a professional judo player denied access to a competitive tournament, to a young child wanting to play netball with her team mates after school, we are acutely aware of the bias towards the capacity of a person who is blind or vision impaired to participate in sporting events.

Whilst many clubs do make a concerted effort to include people who are blind or vision impaired and provide reasonable adjustments, we are aware of numerous instances where reasonable adjustments have not met the needs of the person seeking participation. ‘Allowing’ a child with disability to referee his or her peers’ sport match is not inclusion. Nor is the provision of library time in place of sporting classes or allowing a skilled athlete to train but not participate in tournaments.

“We used to go away around sport carnivals because I could not bear her missing out. They started to give her jobs but kids are astute of whether it is a mickey mouse job or a meaningful job. To think of meaningful jobs in schools requires more thinking and investing”.

Recommendation 13: Blind Citizens Australia recommends that a specific reference to discrimination in sport be included in the consolidated Act, as per Recommendation 29 by the Commission. Blind Citizens Australia also recommends the development of an educative campaign and resources which outline the requirements and support the inclusion of people with disability in mainstream sport and recreation.

³ Graffam, J. et al., 2002a, ‘Employer benefits and costs of employing a person with a disability’, *Journal of Vocational Rehabilitation* 17, pp.251-263.

Access to voting and jury service

As at the date of this submission, people who are blind or vision impaired do not have access to a completely secret, independent and verifiable vote. Whilst there has been a significant commitment by some state and territory governments and the Federal Government at the 2010 Federal election, there is no legal requirement to provide a mechanism for accessible voting. It is inconceivable that an Australian citizen must rely on the assistance of another person, and compromise their privacy, to exercise their democratic right to vote.

“I voted for the first time independently and secretly via the telephone assisted voting...I explained to the electoral staff present and on the telephone that as I had never voted independently before and being blind had never obviously seen how a ballot paper looks or is set out. As a result I explained that I needed a little assistance. This was duly given so the process was easy and for me very exciting I must say...altogether a truly wonderful experience and very liberating.” Member, Brisbane

People who are blind or vision impaired have also been denied jury service due to unsubstantiated concerns about their capacity to form a judgment of the guilt or innocence of an accused person, specifically their ability to gauge facial expressions, behaviour and view visual evidence. Blind Citizens Australia maintains that individuals who are blind or vision impaired can make suitable jurors and should not be denied involvement on the basis of their disability.

Recommendation 14: Blind Citizens Australia recommends the specific inclusion of access to voting and jury service as protected areas of public life in the consolidated Act.

Other areas requiring legislative coverage

Blind Citizens Australia recommends that further consideration and investigation be undertaken regarding the inclusion and protection of the following attributes in the consolidated Act:

- Receipt of workers compensation
- Genetic workplace testing
- Homelessness, domestic violence and socio-economic status
- Vilification
- Assumptions about the presence or effect of an attribute
- Disclosure of an attribute
- Privacy

Exceptions and Exemptions (Questions 20-23)

Temporary Exemptions

Blind Citizens Australia recommends some changes to the current provisions for temporary exemptions to ensure that this process remains fair and transparent to all parties.

Recommendation 15: Blind Citizens Australia recommends

- a) the consolidated Act clearly outlines the purpose of temporary exemptions (ie that the exemption is temporary and only for a short period of time) and the process for considering a temporary application, with specific reference to consultation with the public and groups representing people with disability or other appropriate protected attributes**
- b) the creation of guidelines regarding the application of temporary exemptions including the requirement for an applicant to outline (via a registered Action Plan) what actions will be undertaken during and after the period of exemption to meet compliance with their legal obligations**
- c) the Commission be granted enforcement powers to monitor the status of temporary exemptions and progress by the applicant in meeting the aims of the consolidated Act.**

Current exceptions under the DDA: The Migration Act 1958

The migration of people with disability to Australia is an area where discrimination on the basis of disability not only occurs, but is endorsed as an exception within the DDA. The recent cases of Mrs Simran Kaur and Dr Siyat Abdi, two vision impaired professionals with a significant experience to bring to Australia, illustrate that the laws surrounding migration and disability are not only outdated but arguably discriminatory. An inquiry conducted by the Joint Standing Committee on Migration, recommended that

“ ... as part of its proposal to amalgamate Australian discrimination law, the Australian Government review the Disability Discrimination Act 1992 (Cth) with particular reference to the section 52 migration exemption, to determine its legal implications for migration administration and conduct expert consultations on its impact on people with a disability.⁴

Recommendation 16: Blind Citizens Australia recommends that the Attorney General’s department

- a) review the recommendations of the Joint Standing Committee when developing any migration provisions in the consolidated Act, with the view of removing the current exception**

⁴ Joint Standing Committee on Migration, 2010, *Enabling Australia Inquiry into the Migration Treatment of Disability*, available online at: <http://www.aph.gov.au/house/committee/mig/disability/prelims.htm>

- b) provide avenues for applicants with disability to challenge an unreasonable refusal of an application, where disability appears to have been a significant consideration.

Complaints and Compliance Framework (Questions 24-27)

Are there 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?

Effectiveness of the DDA Standards

Blind Citizens Australia supports the continued use, development and promotion of Disability Standards as a mechanism within the consolidated Act. Whilst the Standards have led to improvements in access for people with disability, there is scope for improvement particularly in their implementation.

Knowledge and promotion of the Standards

In 2011, Blind Citizens Australia held consultations around Australia about the *Disability Standards for Education* (DSE) to inform our own submission to the five year review. The overwhelming majority of the parents and students we spoke with had never heard of the Standards. This is a huge cause for concern as this has implications on the ability of parents and students to effectively advocate for adjustments. We refer the Attorney General's department to our [submission to the DSE Review](#) which provides detailed recommendations on how to improve the effectiveness of this Standard.

"I do have a DLO who has a PHD but he has no idea about vision impairment and I am having to teach them about how to best service my needs. This is really tiring. We have all gone through hardships, but this is sad, the Standards have not changed anything for me. It is simply a nice pretty brochure."

The lack of clarity as to what is covered (and not covered) within a Standard, difficulty obtaining external information cited in Standards (such as Australian Standards clauses which must be purchased separately) and the limited options for recourse have severely limited the number of complaints which are pursued.

Recommendation 17: Blind Citizens Australia recommends that the Australian Government develop public campaigns, in collaboration with the Australian Human Rights Commission, to promote each individual Disability Standard as legal requirements under the new consolidated Act.

Implementation of timeframes and effectiveness of five year reviews

A key area of concern for people with disability is the implementation of the requirements stated in the Standards within the timeframe specified. As an example, the *Disability*

Standards for Accessible Public Transport (DSAPT) 2002 mandate that all taxis were required to implement raised tactile signage on the three doors exterior to the vehicle prior to 31 December 2007, with five years provided to comply. Blind Citizens Australia is aware of many companies who commenced the rollout of accessible signage in late 2007, with some companies meeting their compliance during the Christmas period of 2007. Whilst it can be argued that compliance was met by the timeline for some forms of access (tram access is one area where compliance is still lagging), people who are blind or vision impaired did not benefit from a progressive rollout of accessible signage.

Concerns also exist about the effectiveness and outcomes of the five year review process. The DSAPT was reviewed in early 2008, with the final Allen Consulting Report released by the Federal Government in June 2011 – over three years after the review was conducted and only one year prior to the next scheduled five year review. The DSE also underwent review in 2011, with the results of this review still pending – and silent.

Greater enforceability of the Standards, and their independent review, is required to ensure the minimisation of discrimination of people with disability in education, access to transport and access to the built environment.

Recommendation 18: Blind Citizens Australia recommends that the Commission be granted the powers to enforce compliance to the requirements of Disability Standards.

Employment discrimination – the need for Disability Standards for Employment

In 2010-2011, the Commission handled 2176 complaints relating to disability discrimination, with 31% of complainants alleging discrimination in employment. This was second to access to goods, services and facilities (35%)⁵.

Research conducted by PriceWaterhouseCooper in late 2011 concluded that people with disability are twice as likely to be unemployed than people without disability, with Australia ranked 21st out of 29 developed countries in the employment participation rates of people with disability⁶. This statistic is more alarming for people who are blind or vision impaired, with a 2007 study conducted by Vision Australia concluding that 63% of people of workforce age are unemployed or under-employed⁷.

Whilst attempts have been made to remedy this situation – the development of the National Mental Health and Disability Employment Strategy in 2009 and National Disability Strategy in 2010 – the unemployment of people who are blind or vision impaired remains unchanged, demonstrating the need for more targeted, legislative action.

In the late 90s, significant work was undertaken to develop a draft Disability Standards for Employment which was never ratified.

⁵ Refer to 1

⁶ PriceWaterhouseCooper, 2011, *Disability Expectations: Investing in a better life, a stronger Australia* available from www.pwc.com.au/industry/government/assets/disability-in-australia.pdf

⁷ Vision Australia, 2007, *Results and Observations from Research into Employment Levels in Australia* available from www.visionaustralia.org.au/docs/news_events/Employment_Details.doc

Recommendation 19: Blind Citizens Australia recommends that the Attorney General's department, as part of the development of a consolidated Act, investigate the development of a new draft Disability Standard for Employment which specifically addresses: reasonable adjustments in employment; inherent requirements (including 'desirable' criteria which may be discriminatory such as the request for a drivers licence for predominantly office based roles); recruitment and advertising of positions; promotion and career advancement; occupational health and safety; vicarious liability, protection of associates and standards for harassment and victimisation.

Accessibility and Procurement

A significant barrier to the inclusion and employment of people with disability is the inconsistent application of universal design principles in development and procurement – from everyday items such as a washing machine to new computer systems and technology used by people with disability in the public and private sector. The accessibility of commercial and government websites is also a crucially important tool for inclusion.

Recommendation 20: Blind Citizens Australia recommends that the consolidated Act consider the inclusion of accessible purchasing and procurement as a legal requirement for the public and private sectors. These requirements could be modelled on Section 508 of the US Rehabilitation Act.

Recommendation 21: Blind Citizens Australia recommends that the provision of goods, services and information via technological means (such as the internet, smart phones, technologically enabled household products etc) must comply with accessibility standards and be specifically referenced in the consolidated Act.

Development of co-regulated guidelines

Blind Citizens Australia, in principle, supports Recommendation 42 by the Commission for the subsequent development of enforceable regulatory standards regarding any area of public life and any attributes covered by the legislation.

Recommendation 22: If the development of co-regulated guidelines is approved, Blind Citizens Australia recommends stringent requirements for

- a) effective consultation with people with protected attributes – in the case of people with disability, consultation and information must be accessible, with technical information communicated in a manner that can be understood by people with all types of disability**
- b) compliance with the requirements of the consolidated Act and relevant standards**
- c) enforceability, including a transparent complaints mechanism**

Improving the effectiveness of the conciliation process

As highlighted earlier in this submission, many people with disability find the complaints process complex and intimidating. Whilst conciliation provides a no cost jurisdiction for individual complaints, there are several areas where the effectiveness of the conciliation process could be improved, including the enforceability of decisions.

Firstly, the voluntary nature of the conciliation process requires urgent review. Whilst the Commission has the power to compel a respondent to attend a conciliation under the AHRC Act, this power is not well known. In fact, Blind Citizens Australia was only recently made aware of its existence by chance. The voluntary nature of the complaints mechanism as it currently stands effectively allows a respondent to choose whether to attend a conciliation and essentially enables the respondent to decline further involvement at their choosing at any stage of the process, without financial or punitive recourse.

This leaves people with disability, who have often placed a significant emotional and financial investment in their complaint, with the choice of pursuing their matter in court (potentially without qualified legal representation due to costs) or to terminate the complaint with the knowledge that the discrimination may continue. Even in an effective conciliation, the power imbalance between well funded respondents and individuals can leave complainants with the feeling that if they do not settle now, there will be no settlement at all. Further as the number of conciliation cases which make it to court are small, the incentive to resolve a complaint at – or before – conciliation is minimal.

Recommendation 23: Blind Citizens Australia recommends

- a) simplification of the complaints process, including how complaints can be made and received**
- b) the review of the conciliation process to determine whether this is the most effective mechanism to resolve complaints, particularly in addressing the power imbalance which often exists between complaints and respondents and to minimise coercion to settle a case prematurely**
- c) the introduction of a compulsory requirement that respondents be compelled by the Commission to attend conciliation or suitable dispute resolution mechanism**
- d) the introduction of penalties for non-attendance and non compliance of agreed outcomes**
- e) that respondents be required to formally respond and make ‘good faith’ attempts to resolve claims by a complainant of disability discrimination, harassment or treatment which is prohibited, within a set timeframe**

Improvements to the court process for anti-discrimination complaints

As highlighted above, the progression of disability discrimination matters to court can be impeded by the cost of legal representation and the potential costs of losing a matter, amongst other factors. Blind Citizens Australia asserts that the introduction of a no-cost jurisdiction would lead to greater systemic changes and increased inclusion of people with disability. Whilst concerns about an increase of vexatious complaints have been raised, we

believe that complaints without merit can be easily “weeded out” by the Commission prior to making their way to a court process.

Recommendation 24: Blind Citizens Australia supports the recommendation of the introduction of a no-cost jurisdiction for discrimination complaints, with judges given the discretionary power to award costs against corporate respondents in the event that a complainant is successful in proving unlawful discrimination (as proposed in the Discrimination Law Experts’ Group submission, December 2011).

“I am a lawyer and even I think twice before lodging complaints, especially if there are a number of respondents because if the complaint progresses to the Federal Magistrates’ or Federal Court, I don’t want to expose my family to cost orders. I am the main income earner for the family and I can’t afford to engage a Barrister to represent me if the matter gets to court.” Male NSW

Clarity around unjustifiable hardship

Blind Citizens Australia notes that the notion of unjustifiable hardship can be subjective. It should be incumbent on the Act rather than the courts to provide a level of guidance on what the considerations are in determining what reasonably constitutes an unjustifiable hardship.

Recommendation 25: Blind Citizens Australia recommends increased clarification in the consolidated Act, or in supporting guidelines, about what can reasonably constitute unjustifiable hardship, both for complainants and respondents.

Roles and functions of the Commission to provide a more effective compliance regime

Blind Citizens Australia would welcome sweeping changes to the role and function of the Australian Human Rights Commission.

Independence of the Commission

Blind Citizens Australia recommends that the current role of the Commission be reviewed to provide two separate and independent functions – the provision of a conciliation or alternative dispute resolution service similar to current arrangements (but subject to amendments as outlined above) and the introduction of an investigative and enforcement role.

The Commission as an investigative and enforcement body

Blind Citizens Australia recommends that the Commission be given increased powers to investigate systemic discrimination and enforce and monitor the outcomes of settlement agreements and actions. In Australia, most forms of protection legislation have a government authority to enforce compliance - the ACCC covers consumer protection and prosecutes companies to enforce their legal requirements whilst ASIC enforces company laws. Yet discrimination laws which are meant to protect individuals experiencing

marginalisation require the same individuals to enforce the outcomes at their own personal and financial cost. This is not satisfactory.

Greater enforcement of settlement agreement breaches is also needed. At present, people lodging complaints of discrimination are required to show “good faith” that the outcome/s agreed at conciliation and during settlement will be adhered to and implemented. There is currently no enforceable mechanism for respondents to report their progress after a settlement has been reached. Furthermore, many individuals are so worn out from the process of lodging a complaint, or have no further dealings with the respondent, that follow up is unlikely to occur.

Blind Citizens Australia is broadly supportive of Recommendations 36-38 by the Commission for the mandatory development and publication by public authorities of Action Plans covering all protected attributes and the certification of such plans under the consolidated Act. Whilst the development of Plans go some way to minimising discriminatory practices, added provisions are required to ensure that

- there is a requirement for public sector bodies and the private sector to clearly communicate the content of Action Plans to all levels of management and staff rather than rest its implementation with one unit responsible for “inclusion”
- powers are granted to the Commission to investigate breaches of compliance and to ensure enforcements of Plans.

Case study: A woman with a dual sensory disability approached her local branch of a major Australian bank seeking copies of her bank statements in large print. The customer was initially told that this could not be generated by the system and could not be provided. The customer was encouraged to use the online facility which was not a suitable alternative due to unrelated privacy breaches in her personal life. The customer’s request for a reasonable adjustment was only met after an advocate became involved. This was despite the bank having a public access and inclusion plan on their website.

Conduct systemic investigations and improving systemic redress

At present, the onus rests on an individual or an advocacy organisation, such as Blind Citizens Australia, to take on matters of systemic discrimination with no guarantee of successful redress but significant concerns about cost. As the recent *King vs Jetstar* case illustrates, even where disability discrimination would appear to have occurred, individuals with disability are forced to face the burden of addressing discrimination alone without the assistance or resources of an independent enforcement body. The issue of airline access is one which impacts on a significant number of people with disability and requires systemic attention.

For people who are blind or vision impaired, there are numerous examples of systemic discrimination which remain unaddressed due to the perceived and real burden of costs to take a matter to court.

As one example, touch screen technology has increased in prevalence with the introduction of supermarket self service checkouts, kiosks, banks and use by government

bodies such as Medicare. Whilst touch screen technology can be developed to be accessible to people who are blind or vision impaired, most if not all touch screens in the above examples do not have built in accessibility.

“I walked into Medicare and stood there like a shag on a rock near the entrance. I could not see the touch screen and did not know what to press. People just kept walking around me and it was only after about five minutes of waiting that another customer came up and asked if I wanted assistance. I was taken to the counter and the lady asked me for my voucher number. As I didn't have one I was told that I would need to kindly wait but that in future I should make 'myself known' by going to the counter. This is not exactly easy when you are blind. The whole experience made me feel like an idiot”. Female, NSW

Blind Citizens Australia and Vision Australia, one of the largest blindness service providers in Australia, formally notified the Department responsible for Medicare of this issue in 2008, with a working group established to improve touch screen access. With the group disbanded shortly thereafter with no progress, formal written contact was recently made with the Commission requesting a systemic investigation of this issue. In written correspondence, the Commission advised that it did not currently have the resource capacity to commit to a systemic investigation of this issue, despite acknowledgement that this could have a widespread discriminatory impact on some groups of people with disabilities.

Other systemic issues requiring investigation include audible announcements on board public transport vehicles, provision of an accessible voting mechanism and the greater prevalence of 'silent' hybrid vehicles (which can present issues for people who are blind or vision impaired and people with dual disabilities who may not be able to hear their approach). It is not reasonable to assume that small not for profit organisations, community legal centres or in fact individuals who themselves may be on a low income, should be expected to address widespread discrimination at their own personal cost. These examples strongly highlight a failing system.

Special Purpose Commissioners

Blind Citizens Australia supports Recommendation 5 by the Commission which recommends that the offices of the current discrimination commissioners, including the Disability Discrimination Commissioner, be maintained. Further to this, Blind Citizens Australia recommends that special purpose commissioners be required to report how progress in eliminating discrimination is being achieved yearly or biennially.

Recommendation 26: Blind Citizens Australia recommends that

- a) the Commission be given the powers to undertake preventative work to minimise discrimination, including the provision of assistance and advice to enable organisations to meet positive duties**
- b) the Commission's inquiry powers and functions under the AHRC Act should apply to all areas of public life and attributes that will be covered in the consolidated Act**

- c) the provision of increased resources to enable the Commission to undertake an audit and enforcement function
- d) powers and resources are granted to the Commission to investigate systemic discrimination which is of the public interest
- e) the Commission be granted the power to take matters of individual or systemic discrimination to court following receipt of an individual complaint, public submission or approach by an organisation representing the interest of people with a protected attribute
- f) the Commission be granted the power to appear in legal proceedings in relation to discrimination of a person/s with protected attributes
- g) continuation of special purpose commissioners who are required to report how progress to eliminate discrimination is being achieved, either yearly or biennially.

Interaction with Other Laws and Application to State and Territory Governments (Question 28-30)

Should the consolidation bill apply to State and Territory Governments and instrumentalities?

Blind Citizens Australia would welcome greater compatibility and consistency between legislation protecting the rights of individuals with protected attributes, such as the consolidated Act and other Federal and state instruments. As highlighted earlier as an example, the employment of people who are blind or vision impaired is often tarnished with concerns of increased occupational health and safety risks and compliance with the requirements of OH&S laws. We are aware of some employers who have commented that their obligation to provide a safe environment trumps the requirements of disability discrimination law. It is imperative that laws protecting the rights of people with protected attributes are viewed and promoted as legal requirements which must be complied with on an equal par with the requirements of other legislation.

Recommendation 27: Blind Citizens Australia recommends clear guidance in the development of a consolidated Act regarding its applicability and relationship with other State, Territory and Federal laws, including clarity that the consolidated Act takes precedence or is of equal standing with the requirements of other Acts.

Recommendation 28: Blind Citizens Australia supports Recommendation 53 by the Commission that a consolidated Act should have the same extent of application to State and Territory governments as the current DDA and that this should cover all protected attributes.