



**SUBMISSION IN RESPONSE TO
ATTORNEY-GENERAL'S DEPARTMENT
DISCUSSION PAPER
CONSOLIDATION OF COMMONWEALTH
ANTI-DISCRIMINATION LAWS**

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Introduction

COTA Australia is the national policy arm of the eight State and Territory Councils on the Ageing (COTA) in NSW, Queensland, Tasmania, South Australia, Victoria, Western Australia, ACT and the Northern Territory.

COTA Australia has a focus on national policy issues from the perspective of older people as citizens and consumers and seeks to promote, improve and protect the circumstances and wellbeing of older people in Australia. This submission incorporates the views of our members developed through various consultation mechanisms and agreed by the National Policy Council.

COTA's policy work is guided by five policy principles:

- maximising the social, economic and political participation of older Australians;
- promoting positive views of ageing, rejecting ageism and challenging negative stereotypes;
- promoting sustainable, fair and responsible policies;
- focusing on protecting against and redressing disadvantage; and
- protecting and extending services and programs that are used and valued by older Australians.

COTA's draft submission responds to the Attorney-General's Department's Discussion Paper (the Paper) entitled the *Consolidation of Commonwealth Anti-Discrimination Laws*

In this context, consolidation refers to the introduction of a single, comprehensive law to replace the existing four separate pieces of legislation, dealing with the grounds or "attributes" of sex, race, disability and age and the act, that established the Australian Human Rights Commission (AHRC).

We applaud the declaration of principles as a safety net for articulating expectations about the protecting human rights and meeting our international obligations while introducing simpler and most cost-effective mechanisms.

We also note Treasury's *Well-being Framework* (Treasury 2004) as a descriptive tool to guide the Department of Finance in its assessment of the exposure draft bill because it recognises that the expression of human freedom or rights includes "their effective opportunities to exercise those rights, given their personal and social circumstances".

Although particular UN Conventions will be used to ground provisions on the attributes of race, women, disability and children (para 6), COTA Australia anticipates that for older people, it would be feasible to call into service the *International Convention on Civil & Political Rights*; *International Convention on Economic, Social and Cultural Rights*; and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. This submission highlights the need for a statute that obliges duty-holders to respond to the ageing society by removing barriers to participation, and to revise the

existing “positive discrimination” provisions. Reference to this type of objective could be made in the explanatory notes to the bill.

We note the discussion paper presents a lot of good descriptions and options for reform including comparative provisions from other State or other national jurisdictions, e.g. more effective powers for the AHRC (para 225), such as investigation without an individual complaint as available to the Victorian Commission. It stops short of illustrating whether this and other options are used in practice and how they advance anti-discrimination. The paper does not give a snapshot of the status of anti-discrimination action, evident through complaint-making, analysis of cases, or more systemic interventions. Information of an evaluative kind would have been helpful in responding to some questions, e.g. Q27.

COTA Australia notes how the Paper illustrates options for change with provisions in other jurisdictions, both States/Territories and in other countries. While these illustrations are good starting points, generally it would be helpful to have some analysis of how the provisions have been applied, particularly as they could become part of the new draft Australian bill.

Issues of special relevance to the ageing of society

The Discussion Paper does not expressly consider an objects clause for the proposed equality act.

With respect to an objects clause, COTA Australia recommends the retention of the rights of older people in our ageing society - in other words, age alone as the attribute is not sufficient expression without supplementary reference to the demographic change recognised in the objects of the current ADA. Therefore, we recommend retaining or incorporating the only object expressly relevant to older people in an ageing society from the *Age Discrimination Act 2004* s3 (e):

(e) to respond to demographic change by:

*(i) removing barriers to older people participating in society, particularly in the workforce;
and*

(ii) changing negative stereotypes about older people;

bearing in mind the international commitment to eliminate age discrimination reflected in the Political Declaration adopted in Madrid, Spain on 12 April 2002 by the Second World Assembly on Ageing.

In anti-discrimination law, the categories or attributes such as age – both young and old – are embedded in approaches to social organisation, legitimacy and social inclusion. In adopting age as a category, and most particularly recognition of barriers on reaching older ages, there is or should be the presumption to influence the evolution of ongoing practices (Bacchi 2010).

It is widely recognised that anti-discrimination legislation gives relatively little protection to older people, compared to groupings covered by other attributes. Technically, the

excessively broad exemptions in the ADA are regarded as the reason for some of the lawful exclusion on the basis of age (Encel 2004; Hemingway; Eastal & others 2007).

In December 2011, the Attorney-General announced the National Human Rights Action Plan. COTA Australia is pleased by the Commonwealth Government's commitment "to review federal legislation to identify provisions that may create barriers to older people participating in productive work." It would be helpful if this review could extend to federal programs or, at least to federal programs whose age restrictions have not been reviewed in with respect to our ageing society and the risk of supporting negative stereotypes. Such a review could represent the exercise of a positive duty, considered under Q5 below.

While the objectives of the Victorian Act, the Equal Opportunity Act 2010 (s3) may be a useful basis for a harmonised Commonwealth equality act, protection against discrimination of older people in an ageing society may fall to the provisions and administration of 'temporary exemptions' and 'positive discrimination'/'special measures' (s3(d)) discussed below under Qs 3,5, and 24.

Our Submission largely follows the Discussion Paper's (the Paper) text and questions, and refers to its page and paragraph numbers.

Meaning of Discrimination

Question 1 – on defining discrimination and tests for discrimination

COTA Australia agrees that, for direct discrimination, the comparator test is problematic as discussed at the Canberra and Sydney seminars.

In our experience, use of the comparator 'test' between older and younger people facing a similar situation, detracts from the significance of 'the level of opportunity and freedom that people enjoy', where freedom incorporates freedom from oppression or constraint and freedom to act across the life course. Concretely, the purpose of the 'opportunity' needs to be central to the analysis and maximizing the freedom of people to participate rather than face a traditional restriction based on age.

COTA therefore, prefers the detriment test to be used. The concept of detriment can also be used to condition any exemptions or limitation clauses to be proposed in the draft exposure bill.

The Discussion Paper (paras 44-47) considers the categories of 'direct' and 'indirect' discrimination, giving support to withdraw the label for 'indirect discrimination'. However, COTA Australia recommends retaining these categories - 'direct' discrimination and 'indirect' discrimination. They continue to have a useful place, in an educative sense. 'Indirect discrimination' will continue to need to be explained, as it is sometimes unwitting and certainly less obvious, although nonetheless real, damaging and unlawful. In fact, with greater awareness of anti-discrimination law, one might expect the extent of 'indirect discrimination' to become even more significant.

The Discussion Paper anticipates an explanatory memorandum may be necessary (para 47) to minimise 'the risk of diminution of protection', 'avoidance of doubt provisions'. COTA

Australia supports the use of explanatory memoranda, generally. COTA Australia recommends that draft explanatory memoranda accompany the draft exposure bill.

Q2 How should the 'burden of proving' discrimination be allocated?

At the Sydney seminar, Professor Ron McCallum AO (representing National People with Disability and Carers Council) proposed the phrasing of 'establishing a rebuttal presumption' to 'reversing the onus of proof' with respect to the obligations for positive actions to be taken, as discussed in the Paper (paras 54-56). COTA Australia supports this phrasing because it is better for community education in recognising the obligatory responsibilities, and is appropriate for the consolidation reform process.

Q3 include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

The **terminology of 'special measures'** seems to be used interchangeably with 'exemptions' and 'positive discrimination'. For example, the Paper refers to provisions under the ADA (s33 (c)) as special measures whereas the ADA refers to s33 (a) and (b) as "positive discrimination".

Under the ADA, the provision for "positive discrimination" (s33) has some unintended consequences in so far as it can undermine the object of responding to demographic change (s3(e)). Duty holders can absolve themselves from obligations to respond to an ageing society by claiming their traditional practice as "positive discrimination" or a beneficial measure for young people.

For older people in an ageing society, in sociological terms, the problematizing needs to re-focus on the societal activity/decision-making (Bacchi 2009), and avoidance of detriment, rather than be offsetting treatment of one age group against another.

For old-age discrimination in our ageing society, COTA Australia questions the appropriateness of a uniform 'special measures' provision, recommended in the AHRC submission (pp.17-19). Further consideration is needed given the absence of an international convention applying to old-age and the unintended consequences of the existing special measures/"positive discrimination". Wording of the UN's Political Declaration at the Madrid Second World Assembly on Ageing, emphasises the broader life course, a society-wide view, empowerment and participation of older people in societies experiencing demographic change.

EXAMPLE – EMERGING ARTIST AWARDS RESTRICTING OLDER PEOPLE

With the ageing of the population, older people are making the transition to retirement (ABS 2011) and art schools are reporting a trend in enrolments of older people (Cunningham 2010 p. 18 for the Australia Council). Research for the Australia Council reported that: “Artists are older on average than other workers, for two main reasons:

- Workers in conventional jobs tend to retire in their 60s or even earlier, whereas artists often decide to continue their creative work beyond a standard retirement age. Therefore, the proportion of the workforce above 60 years of age is greater for artists than for other occupations.
- The career path of an artist is much less defined than a career path for non-artistic occupations and becoming established often takes substantial time for training, practice and exposure. Hence artists tend to be older than other workers when their career finally takes off.” (Throsby & Zednik 2010).

COTA NSW has received enquiries from older people and arts administrators about the traditional practice of restricting Emerging Artists (in the visual arts) awards to younger adults, usually less than 35 years of age. In the visual arts, the opportunity for emerging artists to exhibit works is significant culturally and even economically.

While the intent of the administrators is to reward emergent arts practice, probably on traditional grounds, the restriction of old aged people has often been retained as an entry requirement, particularly by federal agencies and the major prizes. However, some arts administrators are aware of this anomaly and have now dropped the age-of-artist criterion. Some Emerging Artist prizes do not discriminate on the basis of age e.g. the Blake Society, and some local government prizes (e.g. Marrickville Council).

Unfortunately some arts administrators have retained the restriction of older people, defending their decision on legal advice suggesting that Emerging Artists awards are ‘positive’ or special measures for young people (ADA s33). Some administrators have renamed their awards as Young Emerging Artists Awards although not offering an “Old Emerging Artists Award”! Despite being lawful, the practice nonetheless appears contrary to the ADA’s object (s3(e)) of responding to our ageing society and removing barriers to older people participating in society or changing negative stereotypes. Opportunities exist for encouraging people to learn and practice visual arts later in life and overcome negative stereotypes about older people’s activities and expectations.

Our view is that the process of ‘demographic change’, recognised by the objects of the ADA, that is manifest through an increase proportion of older people in the population and a much greater longevity, warrants reviews of traditional practices using upper age limits in a restrictive manner (House of Representatives 1992). We are encouraged by the review of legislative barriers to older people’s participation in productive work, announced in the NHRAP.

Q4. Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

The Paper briefly considers the defence to making reasonable adjustment, ‘unjustifiable hardship’ (para 62).

We draw attention to the Review of the Disability Standards for Accessible Public Transport and the June 2011 Response from the Commonwealth Government:

The Review notes that current utilisation of unjustifiable hardship provision is uncertain because there is no registration or other means to lodge a claim, other than in the process of defending a legal action. As such, it is likely that there are operators and providers who currently believe that they could legitimately make a claim of unjustifiable hardship, but have not, as yet, been required to make one. (p.5)
[underlining added for emphasis]

And on ‘equivalent access provisions’, the Government’s Response picked up on the disincentive facing operators and providers to use ‘equivalent access provisions’ because there is currently no mechanism to confirm that these provisions are compliant with the Transport Standards.

The Paper raises the potential of registration (para 176) or certification (para 185-186) as a means of obtaining greater clarity of reasonable adjustment to accommodate people with disabilities, and this has analogy to other attributes (or even responding to demographic change, as for old-age anti-discrimination measures).

In response to Q4 COTA Australia recommends that the duty to make reasonable adjustment should be clarified, and that it should also extend to other attributes, at least to apply to the process of ageing and the risk of old-age discrimination. Clarity may include obtaining sound assessments of options.

Therefore, COTA Australia considers that the duty to make reasonable adjustment should be broadly defined to accommodate all attributes, including old-age. COTA Australia supports:

- the duty to make reasonable adjustment a standalone provision, and that failure to make such provision should become an independent basis for complaint or investigation; and
- the test for unjustifiable hardship should be linked to the objects clause that incorporates old-age and ageing as currently defined by s3 (e) ADA and discussed in this submission.

Q5. Should public sector organisations have a positive duty to eliminate discrimination and harassment?

COTA Australia supports the Paper’s separate discussion of the duty to make reasonable adjustment and positive duties, noted by the AHRC submission.

The Convention on the Rights of Persons with Disability specifically includes assistive technology, aids and devices as a means of achieving equity. Article 2 of the Convention spells out universal design too, as a means of achieving equity together with assistive technology. So the issue of doing something positive versus not doing anything negative is an important one. It facilitates mainstreaming people with disabilities (Preamble (g)) and reduces the barriers to them competing for educational places, jobs or rental accommodation.

Such positive duties on public sector organisations could trigger a procedure for reviewing their use of old- age as an eligibility criterion in their programs. Therefore, COTA Australia supports the need for public sector organisations to take positive action.

The exercise of positive duties can be regarded as a third approach to actions for identifying and phasing out systemic discrimination, beyond individual complaints and investigation by a regulator. This could be introduced by Commonwealth agencies into their programs and funding arrangements.

Protected attributes

The Paper lists attributes covered by the core anti-discrimination legislation (para 71).

COTA supports the proposals for the consolidation bill to address a combination of attributes (para 72) and to add new protected attributes, sexual orientation and gender identity (para 73).

At the Sydney seminar, participants suggested adding further attributes: victims of domestic violence (para 95), and persons with a prior criminal record, not only with respect to the area of employment (para 82). Such additions have the potential to benefit older people, on account of their lengthier lives.

Some attributes have been proscribed by exemptions. At the Sydney seminar, participants suggested adding 'visa status' as an attribute. This would entail removing the exemption of the *Migration Act* 1958 from anti-discrimination legislation, or at least amending the exemption so as to be as narrow as possible (as recommended by the 2004 Productivity Commission with respect to both the DDA and the ADA). The 2009 Senate estimates hearings refer to:

- Applicants for the Work and Holiday Visa must be “..at least 18 years of age but must not have turned 31”
- “The Working Holiday visa is aimed at promoting international understanding through helping young people experience the culture of another society”.
- “Various permanent skilled (work) visas have an upper age limit of 45, which reflects the level of productive benefit to the Australian workforce and economy expected of persons entering Australia in this visa category”.

According to the Answer from the Immigration and Citizenship Portfolio to the Senate Budget Estimates hearings (2009), such restrictions are based on 'legitimate, objective and reasonable criteria' although no mention is made of any assessment or considerations of the 'well-being' framework.

COTA Australia suggests a potential benefit would be for older people, as immigrants, to work here and also facilitate reunions. Part of being reunited may also facilitate child care (or even elder care), and freeing up parents to go to paid work or other activities.

Reviewing these practices could be part of a more effective compliance regime for human rights and equal opportunity in employment under ILO Convention No. 111. (paras 208, 211 and Q27). Presumably, these practices would be well within the scope of the review under the NHRAP.

The Paper's discussion of 'regulatory overlap', paras 80-85, refers to some attributes being confined to the area of employment (para 83). COTA suggests the consolidation bill maximises consistency to strengthen awareness of anti-discrimination provisions, without removing any existing protection in some States or Territories.

“Associate discrimination”

Q8. How should discrimination against a person based on the attribute of an 'associate' be protected?

COTA supports the proposal to extend coverage of 'associates' to all protected attributes (para 79), that is beyond the existing provisions under the DDA and RDA. We note the Victorian Commissioner's report found carer status a significant source of complaints for the year 2008-2009, and analysis of the Victorian Commissioner's experience may offer insights for this question. Perhaps some comparisons with other jurisdictions, protecting additional attributes, could be similarly followed up for their utility to the exposure bill.

More than one protected attribute (“intersectional discrimination”)

Q10. Should the consolidation bill protect against 'intersectional discrimination'? If so, how should this be covered?

In principle, such protection would be particularly relevant to the lives of older women, whose relative poverty and vulnerability, can result in their experience of double/multiple jeopardy in areas such as housing (McFerran 2010).

While the Paper refers to Canadian and British provisions prohibiting discriminatory practice on the basis of a combination of two protected attributes (para 88), learning from their experience could most probably assist with this Question 10.

If such protection is to be included in the consolidation bill, COTA suggests adopting a more straightforward term than 'intersectional', possibly 'multiple attribute discrimination'.

Protected Areas: Public Life

Q11. Should the right to equality before the law be extended to sex and other attributes?

COTA recognises that a benefit of a general right of equality before the law, described in para 91, provided by s10 RDA lies in its principal effect: on governments rather than

individuals or businesses. Such an emphasis is particularly salient for government reviewing its processes as a response to our ageing society rather than in individuals prosecuting actions for discrimination. Therefore, COTA supports the extension of the law for the purposes of ageing or older age, although not necessarily for age as an attribute.

COTA also notes an observation about the significance of legal aid funding as a way of overcoming some barriers to people enforcing their rights. The president of the Law Council of Australia, Catherine Gale is reported as saying: "...the lack of assistance to the economically and socially disadvantaged challenged the integrity of the justice system..True equality requires that all these barriers – financial, social and cultural – be removed for all Australians." (Jacobsen 2012)

COTA supports retention of areas of public life, noting the potential need to clarify the meaning of 'public' given that many areas of work, education, provision of goods and services are provided (or will be provided) by the private sector (e.g. 'public transport').

Q12 What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

On the discussion of the mechanism for specifying areas of public life, paras 95-100, for preventing age discrimination, COTA suggests that the proposal recommended in para 99 – any area of public life - applied to discrimination of older people in an ageing society would be most desirable. This approach would appear to avoid a more detailed listing of areas, such as health services the governance of public places and streets, cultural policies (Commonwealth, State, and local government), and transport services (including infrastructure of footways and "public transport"), whether described in explanatory notes or some other guidance.

Q13. How should the consolidation bill protect voluntary workers from discrimination and harassment?

Q14. Should the consolidation bill protect domestic workers from discrimination? If so, how?

COTA also values improving coverage, listed in para 89, such as the protection of domestic workers and voluntary workers. For their independence, many older people rely on voluntary workers and domestic workers to enable them to 'age-in-place'. Many voluntary workers are themselves older people. In the interests of this practice (& government policy) retaining integrity, it is important that anti-discrimination protection be extended to voluntary and domestic workers.

From the discussion paper, we anticipate the capacity to draw on the Queensland legislative experience of covering voluntary workers and Volunteering Australia's experience with its National Standards.

General limitations – exceptions and exemptions

Q 20. Should the consolidation bill adopt a general limitations clause? Are there specific exemptions that would need to be retained?

From the Sydney seminar we learned that the resource burden of exemptions by application would be excessive. The challenge appears to be to find a mechanism that enables practices to be reviewed. We understand the intent would be for a general limitation to replace exceptions, while retaining temporary exemptions, on a show cause basis.

COTA appreciates the broad support for general limitations, yet we note how under the ADA, s33 operates as a general limitations clause - effectively providing circumstances in which discrimination is lawful. It is used, popularly, as a defence to discrimination. Such exceptions are self-regulated. The person/organisation seeking to rely on these exceptions only has the burden of proving that it applies once a complaint of discrimination is lodged and investigated.

With respect to our ageing society, a 1992 House of Representatives Standing Committee recommended that the Commonwealth Government recognise

*that such demographic changes raise questions about **social practices and institutions** that need to be solved in a rational and consensual manner.*

Recommendation 14, p. xv

The provisions for ‘positive discrimination’ in the ADA (s33) (or similarly the NSW Anti-Discrimination Act s49ZJR), in our experience, can be used to stifle questions about practices that restrict the participation of older people. Defensive organisations can rely on maintaining traditional practices in serving a legitimate support to young people that nonetheless restrict access by older people. In this way, a general limitations clause carves out the object of protecting older people from old-age discrimination, and facilitates the perpetuation of systemic old-ageism.

We urge some mechanism – whether guidance materials, education, reporting expectations – to be triggered at the request of the Commission, particularly in activities with Commonwealth funding/support – the support for positive duties to Q5. The concept of action plans, possibly registrable, or co-regulation (the Paper para 176, 177 et seq) appears to be a useful option for reducing the risk of old-age discrimination, recognised in the House of Representatives (1992) Report and in subsequent research.

Complaints and Compliance Framework: Standards

Q24. 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?

COTA supports the use of options other than individual complaints-based processes for meeting anti-discrimination obligations, as described briefly in paras 170-186. However, we

would be interested to be referred to any studies of complaints of old-age discrimination and human rights and compliance models.

COTA Australia appreciates the AHRC's submission's extensive discussion of the interactive effects of legislation on compliance and education and the range of compliance and good practice tools (pp.36-66). Reference to such tools could be made in the explanatory notes to the bill. Producing such tools could assist duty-holders, particularly if they were to be involved in their production.

COTA notes the Discussion Paper's expectation that regulatory standards and management planning applied to reducing disability discrimination are unlikely to have generic application to other attributes. However, the description of registering voluntary actions (paras 174-176) would seem to have greater potential use to reduce risk of discrimination on a range of attributes, e.g. to expedite the commercial adoption of universal housing design ('National Dialogue on Universal Housing Design' 2011). Universal housing design benefits not only people with existing disabilities but also people who may become disabled – while older people are at greater risk than people of younger ages, disability may be temporary or affect people of young ages, as well.

A registration or certification process of 'special measures'/'positive discrimination' is supported, in principle. If modelled on temporary exemptions, COTA Australia would expect criteria for a process of certifying temporary exemptions would include proper consideration of the objects.

Role of Australian Human Rights Commission

Q27. Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

In considering more effective powers for the AHRC, para 225 refers to the Victorian Act *Equal Opportunity Act 2010* (Part 9) that empowers the Victorian Commission to investigate issues of discrimination without an individual complaint, to seek enforceable undertakings and apply to the Victorian tribunal for enforcement. This appears highly desirable. It would be useful to promote this power to constituent groups.

In principle, this capacity for investigating potential discrimination is likely to result in effective systemic remedies to practice, particularly by government organisations. In COTA's experience, older people are concerned about discriminatory practices but are loathe to complain or lodge a formal complaint. Owing to the limitations of the current Age Discrimination Act, they would be better served by an investigatory/advocacy body making enquiries about practices that appear to exclude and/or demean older people from participation.

An investigatory power, without a formal complaint, may need to be exercised by a separate unit or even external agency, such as the Commonwealth Ombudsman. This option would be particularly attractive given the reference to AHRC as neutral conciliators (para 226). Perhaps a model may exist already with the functions of the Fair Work Ombudsman in relation to employment.

The capacity of the AHRC to inquire and educate about practices that appear inconsistent with human rights, as distinct from non-discrimination, is relevant to institutional responses to Australia's ageing society, discussed in para 212.

With respect to previous recommendations for reforming the roles and functions of the AHRC (paras 207-208), the Parliament's *Expectations of Life* report (1992) is useful to revisit:

*"2 That the Human Rights and Equal Opportunities Commission run a community **education campaign** against age discrimination and "ageism" (negative stereotyped attitudes to the aged) and on the value of older employees.*

...14 That the Commonwealth Government recognise -

- that the changing demographic structure of the population requires reassessment of the value and importance, both socially and economically, of life outside traditional work. The capacity of people to confer value (that is, value without a dollar equivalent) on their own "labour time-use" will be increasingly significant when expectation of far longer active life coincides with a likely reduction in the length of the paid work life, especially physical work;*
- that the increasing absolute and relative numbers of the aged in Australian society do not impose a burden on the economy or threaten the viability of the health and welfare system; and*
- that such demographic changes raise questions about **social practices and institutions** that need to be solved in a rational and consensual manner.*

Culture and the arts

Cultural Facilities

29 That the Minister for the Arts, Sport, the Environment and Territories -

- consult with the States with a view to increasing the accessibility of cultural facilities (especially theatres, concert halls, art galleries, and museums) to old people by taking steps to overcome the barriers identified in Para 5.36.*
- take note of and act upon Australia Council's suggestions for increasing general, and particularly older people's, participation in cultural activity.*

(Page xv).

Conclusion

COTA Australia appreciates the opportunity to comment on the Discussion Paper and address some of its questions.

COTA Australia's key points are that:

- old-age discrimination, in the face of our ageing society, is challenging and at issue is the general limitation at s33 of the Age Discrimination Act 2004 (Appendix 1)
- the Discussion Paper offers a glimpse of how other jurisdictions make provision for different ways of dealing with issues
- more work needs to be done to refine some options, based on an analysis of comparative law and administration, before a draft bills is produced
- the exposure draft bill should be accompanied by draft explanatory notes.

COTA Australia welcomes the opportunity to discuss our submission and to review the draft exposure bill and explanatory notes.

Abbreviations and Glossary of Terms

ADA - Anti-Discrimination Act 2004

AHRC – Australian Human Rights Commission

COTA - Council on the Ageing

THE PAPER - the Attorney-General's Discussion Paper

NHRAP – National Human Rights Action Plan

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our policy analysis and advice to Treasury Ministers and, through them, to the Government.”]

http://www.treasury.gov.au/documents/876/HTML/docshell.asp?URL=Policy_advice_Treasury_wellbeing_framework.htm

United Nations (2002) Political Declaration and Madrid International Action Plan on Ageing, Second World Assembly on Ageing

<http://social.un.org/index/Ageing/Resources/MadridInternationalPlanofActiononAgeing/MadridInternationalPlanActiononAgeing2002.aspx>

Volunteering Australia (2011) *National standards for best practice in the management of volunteers*



The National Standards for Involving Volunteers in Not for Profit Organisations (National Standards) have been developed by Volunteering Australia through a consultation process with volunteer-involving organisations and volunteers, and aim to promote a model of best practice in the management of volunteers.

The National Standards is a set of three books comprising of the **National Standards**, an **Implementation Guide** and a **Workbook**. Find out more information on the **National Standards**.

Appendix 1 – extracts from anti-discrimination legislation with respect to age discrimination

Age Discrimination Act 2004 – objects (s3), positive discrimination (s33) AGE DISCRIMINATION ACT 2004 - SECT 3

Objects [underlining added]

The objects of this Act are:

(a) to eliminate, as far as possible, discrimination against persons on the ground of age in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information; and

(b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of age, as the rest of the community; and

(c) to allow appropriate benefits and other assistance to be given to people of a certain age, particularly younger and older persons, in recognition of their particular circumstances; and

(d) to promote recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights; and

(e) to respond to demographic change by:

(i) removing barriers to older people participating in society, particularly in the workforce; and

(ii) changing negative stereotypes about older people;

bearing in mind the international commitment to eliminate age discrimination reflected in the Political Declaration adopted in Madrid, Spain on 12 April 2002 by the Second World Assembly on Ageing.

AGE DISCRIMINATION ACT 2004 - SECT 33

Positive discrimination [underlining added]

This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's age, by an act that is consistent with the purposes of this Act, if:

(a) the act provides a bona fide benefit to persons of a particular age; or

Example 1: This paragraph would cover a hairdresser giving a discount to a person holding a Seniors Card or a similar card, because giving the discount is an act that provides a bona fide benefit to older persons.

Example 2: This paragraph would cover the provision to a particular age group of a scholarship program, competition or similar opportunity to win a prize or benefit.

(b) the act is intended to meet a need that arises out of the age of persons of a particular age; or

Example: Young people often have a greater need for welfare services (including information, support and referral) than other people. This paragraph would therefore cover the provision of welfare services to young homeless people, because such services are intended to meet a need arising out of the age of such people.

(c) the act is intended to reduce a disadvantage experienced by people of a particular age.

Example: Older people are often more disadvantaged by retrenchment than are other people. This paragraph would therefore cover the provision of additional notice entitlements for older workers, because such entitlements are intended to reduce a disadvantage experienced by older people.

NSW Anti-Discrimination Act 1977 Part 4G – Age Discrimination 49Z1R Special needs programs and activities

Nothing in this Part applies to or in respect of anything done to afford persons who are of a particular age or age group access to facilities, [services](#) or opportunities to meet their special needs or to promote equal or improved access for them to facilities, [services](#) and opportunities.

Appendix 2 – ABS Retirement and retirement (employment) intentions

ABS Part-time work popular before retirement

Of the 2.6 million people who are over the age of 45 years and working full-time, 41% intend to transition to part-time work before they retire, according to the Australian Bureau of Statistics (ABS).

However, some Australians intend to keep working indefinitely, with 13% of older workers in the labour force saying that they never intend to retire.

For the other 3.9 million who plan to retire at some time in the future, 36% said the main influence on when to retire was financial security. Personal health or physical ability also influenced retirement decisions for older workers (25%) followed by becoming eligible for a pension (10%).

Just over half of the older workers currently in the labour force, who intend to retire, expect their superannuation to be their main source of income at retirement. A further 26% expect a government pension or allowance to be their main source of income.

Although, in comparison, only 17% of retirees reported superannuation as their main source of current personal income with the majority (66%) reporting a government pension as their main source of income.

The average age at retirement for recent retirees (those who have retired in the last five years) was 61 years. On average, older workers who intend to retire, plan to do so at almost 63 years of age.

Further details can be found in [*Retirement and Retirement Intentions, Australia, July 2010 to June 2011 \(cat. no. 6238.0\)*](#).

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