vision australia

blindness and low vision services

January 31, 2012

Response to Discussion Paper on Consolidation of Anti-Discrimination Legislation

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Submission to:
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Attorney-General's Department
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Introduction

1) Vision Australia is the largest provider of services to people who are blind, have low vision, are deafblind or have a print disability in Australia. It has been formed over the past six years through the merger of several of Australia's oldest, most respected and experienced blindness and low vision agencies. These include Royal Blind Society (NSW), the Royal Victorian Institute for the Blind, Vision Australia Foundation, Royal Blind Foundation of Queensland, and Seeing Eye Dogs Australia.

2) Our vision is that people who are blind or have low vision will increasingly be able to choose to participate fully in every facet of community life. To help realise this goal, we provide high-quality services to the community of people who are blind, have low vision, are deafblind or have a print disability, and their families. The service delivery areas include:

- early childhood
- orientation and mobility
- employment
- accessible information
- recreation
- independent living
- Advocacy, and
- working collaboratively with Government, business and the community to eliminate the barriers our clients face in making life choices and fully exercising rights as Australian citizens.

3) The knowledge and experience we have gained through interaction with clients and their families, and also by the involvement of people who are blind or have low vision at all levels of the Organisation, means that Vision Australia is well placed to provide advice to governments, business and the community on the challenges faced by people who are blind or have low vision fully participating in community life.

4) We have a vibrant client consultative framework, with people who are blind or have low vision representing the voice and needs of clients of the Organisation to the Board and Management through Local Client Groups, Regional Client Committees and a peak internal Client Representative Council. The involvement of people who are blind or have low vision and who are users of Vision Australia's services representing the views of clients is enshrined in Vision Australia's Constitution.

5) Vision Australia is also a significant employer of people who are blind or have low vision. We employ 192 people with vision impairment, or more than 18% of our total staff.

6) Given that Vision Australia is a national disability services organisation, that we provide services at a local level through 67 service centres and outreach clinics, and given that we work with over 47,000 people who are blind, have low vision, who are deafblind, or have a print disability each year, we understand the impact of blindness on individuals and their families. In particular, we are well placed to understand and represent the needs, aspirations and expectations of our clients as they relate to the use of anti-discrimination legislation (especially the *Disability Discrimination Act 1992*) ("the DDA").

7) The following comments relate to the specific questions that are included in the Discussion paper titled *Consolidation of Anti-Discrimination Laws,* which was published in September 2011 by the Commonwealth Attorney-General as part of the public consultation around the harmonisation of Australia's anti-discrimination legislation.

8) Our comments are derived from our interactions with clients, and focus on the experiences of real people who use (or would like to use) the DDA to help eliminate the discrimination that they encounter in everyday life. We do not presume to be legal practitioners, and so we have deliberately chosen not to address specific legal issues such as recommending particular wording for inclusion in the consolidated legislation. We try to convey a sense of "how it is" for people—what is working and what is not, and what the consolidated legislation should include if outcomes for end-users are to be improved and existing protections maintained. For example: probably our most significant concern with the current anti-discrimination legislation is that the complaints-based mechanism is largely ineffective in dealing with entrenched or intransigent discrimination, because the Australian Human Rights Commission ("the AHRC") lacks wide-ranging enforcement powers and is, moreover, not generally prepared to use the enforcement powers that it currently does have in relation to the conciliation process, combined with a costs-based court system that acts as a deterrent to many people who are blind or have low vision (and to people with disability in general). The outcome we are seeking is a mechanism that would address these two factors. The precise nature of such a mechanism, and the way it is formulated in legislation, are best addressed by legal experts rather than an organisation such as ours.

9) We have also chosen not to comment on those questions in the Discussion Paper that do not relate to our activities in providing services to and interactilng

with people who are blind or have low vision. These include the definition of sexual orientation and the handling of religious exemptions. We do view these areas as being important for coverage by the consolidated legislation, but will leave substantive comment to those who have the detailed knowledge and context to provide useful analysis in these areas.

10) It is worth noting that anti-discrimination legislation, perhaps more than most other categories of legislation, is often read by individuals who do not have detailed legal expertise but who, for example, are seeking to find out what their rights are and whether they may have grounds for lodging a complaint. It is therefore important that the consolidated legislation is constructed with the needs of potential end-users in mind. Some sections of current legislation, such as S.12 of the *Disability Discrimination Act 1992* ("the DDA") are almost impossible for the average person to understand. There are, of course, limits to technical simplification and expression in everyday language, but we recommend that preference be given whenever possible to simple constructions over more complex ones when drafting the consolidated legislation.

Comments in response to specific questions in the Discussion paper

Question 1. What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

11) When the DDA was first introduced, there was a view among people who are blind or have low vision that the distinction between direct and indirect discrimination was useful because it implied a difference of intention. Direct discrimination was seen as more blatant or overt, while indirect discrimination was regarded as less intentional and more inadvertent, though probably more widespread due to the socially-constructed nature of endemic discrimination. The courts have certainly not maintained such a distinction, and have repeatedly emphasised that intentionality has nothing to do with whether discrimination is direct or indirect, but the distinction nevertheless was useful in helping individuals make some sense of all the discrimination that they experienced in their daily lives.

12) With 20 years' experience using the DDA, this view is now being questioned as irrelevant at best and counter-productive at worst by many clients. It is true to say that all people who are blind or have low vision still experience discrimination on an almost daily basis, from not being able to use the rail system effectively because of the lack of audible train announcements, to not being able to use inaccessible websites, to the failure of government departments and agencies to provide accessible forms and other correspondence. Most of the discrimination that individuals who are blind or have low vision experience is arguably indirect (although the distinction is by no means clear), yet the effects in limiting equality, social inclusion and full and dignified participation are indistinguishable from those of direct discrimination. There is, in short, nothing "indirect" about the effects of indirect discrimination, and if the use of the term in the legislation is contributing to a community perception that indirect discrimination is less severe or important than direct discrimination, then it is time to abolish it.

13) The maintenance of the distinction between direct and indirect discrimination is made even less helpful by the different and complex tests that are required to establish each type. In general, our clients feel that these tests are poorly understood, difficult to apply, uncertain in outcome, and biased in favour of those respondents who have the resources to exploit the legal complexity for their own ends. The comparator test is particularly problematic, for all the reasons that are summarised in the Discussion Paper. In particular, it is often impossible to predict how a particular judge will construct a hypothetical comparator, and this increases the reluctance that complainants feel about pursuing their complaint through the courts if voluntary conciliation is unsuccessful.

> In January 2011 one of our clients lodged a complaint under the DDA alleging discrimination by a suburban cinema (other aspects of this complaint are discussed later in this submission). The complainant claimed that the cinema proposed to discriminate against her as a person who is blind by requiring that she surrender a photo ID document to the cinema whenever she wished to use a special headset that was able to receive the audio-description track on movies (this technology offers a way for people who are blind or have low vision to receive pre-recorded information about the visual aspects of a movie such as scenery, gestures and facial expressions that would be otherwise unavailable). She alleged, inter alia, that because sighted movie-goers are not required to surrender identity documents for the duration of a movie, the requirement was discriminatory. If this complaint were to proceed to the Federal Court, we anticipate that there would be considerable discussion about the appropriate comparator to apply. Should the comparator be construed as a person

who is not blind and who attends the cinema, or should it be a person who is not blind but who wishes to use one of the special headsets? In practice, the only people who use the special headsets are people who are blind or have low vision. However, if the comparator were construed as a person who is not blind but who nevertheless wished to use a special headset, and if the cinema argued successfully that it would require the surrender of photo ID by such a hypothetical person, then the complainant's case may fail, even though the comparator does not in fact exist. At best, the alternative ways of construing the comparator increase the risk of adverse findings (including adverse costs orders) in the Federal Court, and, at worst, the complainant feels that it would legitimise a state of affairs that makes her participation in the movie-going experience undignified, risky, and much more stressful (the cinema has been disinclined to guarantee that the ID would not be lost while it was in their possession and have been unable to explain how they would ensure that our client is able, as a blind person, to verify that the correct ID document was returned to her).

14) Replacing the comparator element is essential in our view if the consolidated legislation is to result in simpler, clearer and more legislation. We favour a "detriment" test as being the best of the alternative approaches, but with recognition being given to the diminution of human rights that is a particular form of detriment (albeit one that in practice may be more difficult to establish than more concrete forms of detriment).

15) We often encounter situations where a person who is blind or has low vision is subject to discriminatory treatment (for example, being denied employment or enrolment in a particular education program) not because they have a disability per se, but because of a particular characteristic that is (falsely) imputed to them by the discriminator (for example, people who are blind are more accident-prone and therefore "riskier" as employees). We therefore support the inclusion in the consolidated legislation of a "characteristics extension" provision along the lines recommended in the submission from the AHRC in response to the Discussion paper.

16) Our preferred approach for the consolidated legislation is therefore to include a single definition of discrimination that avoids the terms "direct" and "indirect", and which moreover incorporates a unified test that removes the comparator and which is based on a combination of general elements and more specific pathways. We broadly support those recommendations in the AHRC submission that are pertinent to this question, e.g..:

> "Recommendation 7: The Commission recommends consideration of a unified test of discrimination based on a combination of the approaches

taken in the ACT *Discrimination Act 1991* and the RDA or the NT *Anti-Discrimination Act 1992*."

Question 2. How should the burden of proving discrimination be allocated?

17) While "burden of proof" questions really arise only when a complaint reaches the court, the current situation does add to the difficulty of achieving a successful outcome of many legitimate complaints. We strongly support the view that the consolidated legislation should contain a "reverse onus" of proof model for discrimination complaints, based on the principle that once a complainant has made out a prima facie case of discrimination, then the burden of proof should devolve to the respondent, such that it would be the respondent's responsibility to prove that, on the one hand, the alleged discrimination was not caused by the protected attribute or that it did not have a disproportionate impact on the complainant, or, on the other hand, that it was on the basis of a specific exception or exemption from the legislation. It can be very difficult for a complainant to prove causation (which often involves speculating or drawing inferences about the respondent's motives or state of mind) or disparate impact in cases of discrimination, and, moreover, it does not seem reasonable to require that a complainant demonstrate that an exception or exemption fails to apply.

18) We do not have a preferred option for implementing this model, but recommend that if possible the consolidated legislation incorporate a model of proof that has existing currency in other Australian legislation, such as the *Fair Work Act 2009* ("the FWA").

Question 3. Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

19) We note that special measures can be a valuable approach to reducing discrimination against certain groups, and that Australian laws and international conventions contain provisions that allow special measures to be introduced

without breaching anti-discrimination legislation. The consolidated legislation provides an opportunity to remove the inconsistencies between the special measures provision in current anti-discrimination laws and also to ensure that a single special measures provision is consistent with Australia's international obligations.

20) We also support the recommendation that there should be a process for authorising special measures, on a temporary/renewable basis, so that organisations would have some certainty that particular special measures would not breach the legislation. Given that the AHRC already performs functions relating to temporary exemptions, it would seem logical to extend these functions to include the authorisation of special measures.

Question 4. Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

21) The concept of reasonable adjustments has been a very important one in helping to eliminate discrimination on the ground of disability. Many of our clients have been able to gain or maintain employment, and participate in education, sport and other activities, only because reasonable adjustments were made. Sometimes these adjustments are made as the result of a complaint brought under the DDA, but in other cases there is a willingness to make reasonable adjustments as a matter of principle or in keeping with best practice. Beneficial legislation such as the DDA and other anti-discrimination laws achieves positive outcomes not only through the complaints mechanism but also via the uptake of concepts such as reasonable adjustments by society as a whole.

22) However, there is a need for further clarification about the extent and nature of adjustments that are considered reasonable. It not infrequently happens that a respondent (or potential respondent) will make a much smaller adjustment than is requested by a person who is blind or has low vision or than is considered to be best practice. For example, some of our clients have been denied braille curricular materials in certain education courses because the provider is only prepared to provide materials in an audio format, which is a much less satisfactory option for a person whose primary literacy medium is braille. There will also be an element of subjectivity involved with concepts such as reasonable adjustments, but additional clarity and examples would help to promote the objects of the legislation in this regard.

23) We therefore support the extension of the duty to make reasonable adjustments to all attributes covered by the consolidated legislation. We would also recommend that this provision be drafted with a view to providing greater clarity and having regard not only to the existing provision in the DDA but also to other examples in Australian legislation, such as the Victorian *Equal Opportunity Act 2010*, and the Northern Territory *Anti-Discrimination Act 1992*.

Question 5. Should public sector organisations have a positive duty to eliminate discrimination and harassment?

24) We are strongly of the view that public sector organisations should have an explicit, positive duty to eliminate discrimination and harassment for all attributes covered by the consolidated legislation. Current anti-discrimination legislation has not, for example, led to an increase in the percentage of people with a disability employed in the Commonwealth public service—in fact, there has been a decline in recent years, at the same time as the rest of the community are being encouraged to employ people with a disability. The public sector is in a unique position to provide moral and social leadership in the elimination of discrimination, and a legislated positive duty would provide a framework within which such leadership could be exercised. It would also provide a supplementary mechanism for achieving change through the legislation, especially at a systemic level which, at present, is much less susceptible to change by individual complaint.

25) As a way of increasing the capacity of the legislation to reduce systemic discrimination through alternatives to the complaints mechanism, we also recommend that the consolidated legislation extend a positive duty not to discriminate to any organisation that receives funding from a public sector organisation. One way of implementing such a duty would be to require that funded organisations must submit an Action Plan of a type prescribed by the legislation (using the DDA concept of Disability Action Plans as a model).

26) The linkage of funding to socially beneficial outcomes in this way would be analogous to the requirements in the Commonwealth *Disability Services Act 1986* that funding recipients must develop service standards that are reviewed periodically via an audit process.

Question 6. Should the prohibition against harassment cover all protected attributes? If so how would this most clearly be expressed?

Protected Attributes

27) We support the view indicated in the Discussion paper and in other submissions in response to the Discussion Paper that the consolidated legislation should include a prohibition of harassment that covers all protected attributes. We also recommend that the consolidated legislation also make vilification unlawful on the ground of any attribute that is protected by the legislation. This would remove the current inconsistency in Commonwealth anti-discrimination law (the RDA is the only one that prohibits vilification) and also promote harmonisation with those state and territory laws that prohibit vilification on a much wider range of attributes.

Question 7. How should sexual orientation and gender identity be defined?

28) We have no specific comments in response to this question.

Question 8. How should discrimination against a person based on the attribute of an associate be protected?

29) We support the view that discrimination on the basis of being an associate of someone with a protected attribute should be prohibited for all attributes protected by the consolidated legislation. There does not seem to be any reason why the current prohibition in the RDA and the DDA should not be extended to all attributes, and, as the AHRC notes in Para.97 of its submission in response to the Discussion Paper, discrimination on the basis of being an associate of someone with a protected attribute is not in the interests of social inclusion or equal participation.

Question 9. Are the current protections against discrimination on the basis of these attributes appropriate?

30) We note the information provided in the Discussion Paper about those attributes that are protected by state, territory and other Commonwealth legislation but which are not currently protected by Commonwealth anti-discrimination law. We support extending coverage of the consolidated legislation to include all such attributes for which the Commonwealth has the constitutional power to legislate.

31) In principle, we also support giving consideration to including other attributes that are not covered clearly, consistently or at all in existing legislation but which are nevertheless significant problems in Australian society, such as domestic violence and homelessness. The greater the extent of protection from discrimination that can be afforded through legislation, the more benefits will flow to society as a whole, through inclusion and participation in all spheres of life. At the same time, care must be taken to ensure that the legislation maintains existing protections and is extended without loss of clarity and specificity.

Question 10. Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?

32) We understand that the AHRC currently handles a complaint alleging discrimination on the basis of several attributes as a single complaint rather than as one complaint per attribute. This approach seems reasonable, especially given that it is often hard for a complainant to quantify the extent to which alleged discrimination is based on each attribute. It may also be that some discrimination is based on a combination of attributes that cannot easily be separated.

33) We therefore recommend that the consolidated legislation include prohibition of discrimination based on one or more attributes, and make explicit that a complainant is not required to assign proportions to the extent of discrimination based on each attribute.

Question 11. Should the right to equality before the law be extended to sex and/or other attributes?

34) We have no specific comments in response to this question, other than that equality before the law would seem to be fundamental human right that should be protected for all citizens.

Question 12. What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

35) We support a single prohibition on discrimination that would cover all attributes in any area of public life, along the lines of the coverage in S.9 of the RDA. This approach would not diminish existing protection, and would also address gaps and uncertainties in the current application of the DDA, two of which are mentioned below.

36) The DDA currently prohibits discrimination in partnerships, but there is no obvious coverage of franchising and similar arrangements. A number of our clients have reported that they have experienced discrimination when attempting to enter a franchise arrangements, for example, the franchiser has refused to provide contacts and other information in accessible formats. While a franchise arrangement may technically fall within the definition of “club” in the DDA as “an association (whether incorporated or unincorporated) of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association”, this is far from clear, especially to an individual complainant or respondent.

37) The DDA also does not explicitly deal with the accessibility of internet resources such as websites. While the AHRC has advised that in its view the definition of “service” in the DDA includes websites provided by companies and organisation, we are not aware that such coverage has been tested in the courts. There is, in theory at least, some doubt about the extent to which the DDA can be construed to cover new and emerging areas of public life that result from technological and other developments.

38) We would recommend the retention of a list of covered areas, such as that provided in the DDA, but such a list would be illustrative rather than exhaustive.

39) We also recommend that the consolidation of the legislation take the opportunity to simplify the application provisions that, for example, are contained in S.12 of the DDA. As currently constructed, these are very complex and probably almost incomprehensible to an average person who may wish to use the legislation to complain about alleged discrimination.

Question 13. How should the consolidation bill protect voluntary workers from discrimination and harassment?

40) A number of clients have told us that they are deterred from seeking a role as a volunteer because they would not be protected under the DDA from discrimination and harassment on the ground of their disability. Given the increasing importance of the voluntary sector, combined with the high unemployment rate among people with disability (63% for people who are blind or have low vision) there is an urgent need for the consolidated legislation to extend coverage to volunteers for all protected attributes.

41) We understand that the exclusion of volunteers from coverage of the DDA when it was passed in 1992 was due to uncertainty about the ability of the Commonwealth to legislate in this area. We imagine that there have been developments since then that would clarify this. We note, for example, that Section 7(1) of the Commonwealth *Work Health and Safety Act 2011* includes volunteers in the definition of "worker" and this may serve as a useful model for including volunteers in the scope of the consolidated legislation.

Question 14. Should the consolidation bill protect domestic workers from discrimination? If so, how?

42) We recognise that the exceptions that currently exist in anti-discrimination laws in relation to domestic work reflect the need to balance rights to non-discrimination and equality on the one hand against the right to freedom of action in private life on the other. We have had no reports for clients that they have been adversely affected by this exception, and we therefore have no reason to propose that it should be removed or modified in the consolidated legislation.

Question 15. What is the best approach to coverage of clubs and member-based associations?

43) The approach to clubs and member-based associations contained in the DDA is better, in our view, than any alternative approach that sought to define clubs covered by the legislation in terms of size the sale of alcohol. We can see no logical reason why discrimination by a 30-member club should be unlawful, but discrimination by a 29-member club should not. A size-based definition is not, in our view, consistent with the beneficial objects of the legislation, and it would, in addition, diminish protection currently offered to people with a disability by the DDA.

44) While we recognise the need to balance the right to freedom of association against the right to non-discriminatory treatment, we are not in favour of blanket exceptions that would obviate the need for conduct that is prima facie discriminatory to be justified on more general grounds, such as unjustifiable hardship. Even those clubs or associations that are established for people with a particular protected attribute should not be immune from complaint on the basis of a combination of protected attributes that includes the attribute for which the association was established. For example, a person who is blind and uses a wheelchair should not be prevented by the legislation from lodging a complaint against an association established for people who are blind but which makes no provision for people who are blind and who also use wheelchairs. Similarly, a club for gay people that makes no provision for gay people who have low vision should not be automatically exempt from complaint under the consolidated legislation.

45) We recommend that the consolidated legislation adopt the DDA definition of clubs, and that any special exceptions be included only after extensive consultation with all interested parties.

Question 16. Should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?

46) The Discussion paper notes the current inconsistency in the minimum size of partnerships covered by the various anti-discrimination legislation. We support the use of the RDA approach, which does not stipulate a minimum size of partnership. This seems the only way of retaining existing protection for the race attribute, and it would also reflect the fact that there is no minimum size

specification for other types of relationship covered by Commonwealth anti-discrimination legislation.

Question 17. Should discrimination in sport be separately covered? If so, what is the best way to do so?

47) Because sport is an important social, recreational and well-being activity in Australian society, it is appropriate that discrimination in this area be specifically covered in the consolidated legislation. However, this coverage should extend beyond the reference to exclusion from sporting activities that is contained in S.28 of the DDA. It is not clear to potential complainants or respondents whether the failure to provide reasonable adjustments would constitute discriminate under such as S.28, and in many cases the inclusion of people who are blind or have low vision in sporting activities can be achieved by means of reasonable adjustments.

48) We therefore recommend that sport be added to the enumeration of areas of public life covered by the consolidated legislation both to highlight the importance of sport in its own right and also to clarify the obligations of organisers of sporting activities.

Question 18. How should the consolidation bill prohibit discriminatory requests for information?

49) It is obviously important to protect the interests and privacy of people with protected attributes, but also to ensure that information can be gathered for legitimate purposes such as making reasonable adjustments. We know from discussions with our clients that many people who are blind or have low vision are reluctant to provide information about their disability when making job applications because they believe that this information may well be used to discriminate against them. It is almost impossible to prove subsequently that their disability was the real basis on which they were not offered a job (or even a job interview). On the other hand, if employers feel reluctant to request information about the disability (or other protected attribute) of a potential job applicant, they may simply exclude them anyway once their disability (or other attribute) becomes known. To use an example mentioned in the Submission from the AHRC in response to the Discussion Paper, it would be unfortunate to the point of absurdity were we to draft ourselves into a situation where employers were

unwilling to ask a job applicant for their name in case they thereby risked complaints of discrimination on the basis of gender or ethnicity. Balancing the interests of all parties is paramount in this area, and there may be a single approach that will optimally do this.

Question 19. Can the vicarious liability provisions be clarified in the consolidation bill?

50) We support the inclusion of a vicarious liability provision in the consolidated legislation. Even though the existing provision in the DDA has been little used, it is one incentive for employers and other principals to take active measures to prevent discrimination. We recommend that the consolidated legislation include a vicarious liability provision expressed in similar terms to the current provision in the *Racial Discrimination Act 1975* ("the RDA") and the *Sex Discrimination Act 1984* ("the SDA"), since this formulation is simpler and clearer than the provision in the DDA and the *Age Discrimination Act 2004* ("the ADA").

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

51) Our view is that a general limitations clause could offer a simpler approach than the current complex structure of specific exceptions. We therefore recommend that the consolidated legislation contain a general limitations clause that would, as far as possible, replace separately-specified exceptions, provided that this can be taken without diminution of existing protection and loss of clarity and certainty.

Question 21. How should a single inherent requirements / genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

52) We support the inclusion of an "inherent requirements" exception in the consolidated bill that would apply to all attributes and cover employment and

education. The concept of inherent requirements (as opposed to "general occupational qualification) is familiar from the DDA and, as the Discussion Paper notes, directly reflects Australia's obligations under the ILO Convention on Discrimination (Employment and Occupation). It seems appropriate to include education as an area of public life that would be covered by an exception based on inherent requirements, to reflect the fact that even after reasonable adjustments have been made, there are some education and training programs that cannot reasonably be undertaken by a person with a disability.

53) There would be a need to consider the relationship between an "inherent requirements" exception and a general limitations clause, but at this stage we have not formed a view about the best way for this to be done.

Question 22. How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

54) We have no specific comments in response to this question.

Question 23. Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

55) Overall our view is that the temporary exemptions mechanism contained in the DDA has been used so as to promote the objects of the legislation, and we recommend that it be continued and applied to other protected attributes in the consolidated legislation. We also recommend, however, that the legislation include some specific guidance about the purpose of the mechanism and the process that is to be followed by the AHRC when an application for a temporary exemption is received. While the AHRC has always interpreted the purpose of the temporary mechanism in accord with the beneficial nature of the legislation, we know of cases where the initial application was for a permanent exemption. If the transitory nature of the exemption was made explicit in the legislation, together with a requirement that an application for a temporary exemption must include specific details about how the applicant intended to use the period of exemption to achieve compliance with the legislation, then it would be clear to

potential applicants and other interested parties that there are significant responsibilities associated with being granted a temporary exemption.

Question 24. 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?

56) Although the development of Disability Standards under the DDA has been slow and generally frustrating for those involved (and especially for the disability sector) the end results, in the areas of transport, education and access to premises, have been valuable and the Standards are having a greater impact on reducing systemic discrimination (albeit a slower impact than many would like) than individual complaints alone. We certainly recommend that the consolidated legislation include a mechanism for the continued development of Disability Standards and that consideration be given to expanding the areas of public life in which such standards can be developed. We also recommend that consideration be given to extending the standards mechanism to apply to other protected attributes.

Question 25. Are any changes needed to the conciliation process to make it more effective in resolving disputes?

57) The conciliation process used by the AHRC has the advantage that it is no-cost and relatively informal for individual complainants. However, it also contains several significant flaws that, in our view, continue to limit its effectiveness. The most significant flaw is that the conciliation process is voluntary. Although the AHRC has power to compel attendance at a conciliation conference, this power is little known and almost never used.

> In January 2011 one of our clients lodged a complaint under the DDA alleging discrimination against her by a suburban cinema. The cinema refused to attend a voluntary conciliation conference, and the AHRC refused our client's request to use its power under S.46PI and S46PJ of the AHRC Act to compel the respondent to provide certain information and attend a conciliation conference. The AHRC proceeded to terminate the complaint in December 2011, 11 months after it had been lodged and with no progress towards a satisfactory outcome.

58) We strongly disagree with the notion that only voluntary conciliation will produce satisfactory outcomes. There is a long history of compulsory conciliation in the industrial arena, and, in any case, the dynamics of the relationship between complainant and respondent can change once they actually talk to each other, especially in the presence of an experienced conciliator. The current process, while it may encourage discussion and negotiation, also means that, ultimately, the respondent can walk away from the process, leaving the complainant with little choice but to accept termination of the complaint. In reality, most individuals simply cannot pursue complaints in the Federal Court due to the risks and costs involved, and the not inconsiderable difficulty in obtaining appropriate legal advice and representation, and well-resourced corporate respondents are aware of this. Even when corporate respondents do participate in voluntary conciliation, they can still exert considerable pressure on the complainant to accept a conciliated settlement that is much less than what the complainant believes is acceptable.

> In 2008, one of our clients lodged a complaint under the DDA alleging discrimination against by a major supermarket chain. The respondent had recently updated its website, and the process for ordering groceries online was now inaccessible to our client (and also to other people who are blind or have low vision). Among the remedies sought by the complainant was a commitment by the respondent to make the ordering process accessible, and the development by the respondent of a Disability Action Plan so that future websites updates would be done in compliance with best-practice web accessibility guidelines. The respondent agreed to fix the immediate access issues, but refused to develop an Action Plan or even commit to ensuring that it would maintain accessibility in future updates to its website. Our client was unable to obtain expert legal advice about her chances if she took the complaint to the Federal Court, nor did she have the resources to pay legal costs, so she had no choice but to accept the respondent's offer. The immediate access issues were addressed by the respondent, but the next major update to its website in 2001 once again introduced significant accessibility issues.

59) Another flaw in the current process is also illustrated by the case mentioned above: there can be a significant delay between the time a complaint is lodged until conciliation actually takes place. Our experience is that this delay can be due to several, often compounding, factors, including the workload of the conciliator, delays by the respondent in responding to the AHRC's initial notification of the complaint, and delays while the specific details of the conciliation conference are finalised. By the time the conciliation conference actually takes place, the complainant may have lost the emotional energy to

pursue the complaint; in other cases that we know of, the complainant's whole life becomes focused on the complaint and the delays between lodgement and conciliation have an adverse impact on the complainant's health, relationships, work, education and life in general.

60) Some recent experiences suggest that, unfortunately, the AHRC is becoming less inclined to encourage a conciliation conference if initial correspondence between the parties indicates that there are substantial unresolved differences.

> One of our clients recently lodged a complaint under the DDA alleging discrimination against him by a large financial institution, on the basis that the institution's website was inaccessible in certain key respects. The respondent agreed to make some changes, but these changes have been insufficient to provide access. A technical report on the inaccessibility of the website was provided to the respondent by the complainant, but the respondent is not inclined to make further changes. The complainant believes that substantial progress could be made in a face-to-face conciliation conference, but the AHRC has indicated that on the basis of the correspondence it will most likely proceed to terminate the complaint without a conciliation conference. Our client will be unable to pursue the matter in the Federal Court due to the risk of an adverse costs order and the difficulty of finding expert legal representation, and so the complaint will remain unresolved and the discrimination will persist until or unless someone else lodges a similar complaint.

61) It would be a most regrettable outcome if termination of a complaint were to become a substitute for vigorous attempts to achieve a conciliated settlement, because in general an individual complainant's interests are not best served by termination, owing to the very significant difficulties in pursuing a complaint in the Federal Court. It would have the effect of increasing the feelings of powerlessness that many people already feel when experiencing discrimination, and it would undermine the credibility of the AHRC and the legislation itself.

62) If the AHRC lacks the resources to administer the conciliation process in a way that maximises opportunities for individual complainants, then the Government needs to fix the problem.

63) It is our strong recommendation that the current conciliation process be improved by making attendance at a conciliation conference compulsory, and by setting a maximum time (say, 3 months) between a complaint lodgement date and a compulsory conciliation conference.

Question 26. Are any improvements needed to the court process for anti-discrimination complaints?

64) We are strongly of the view that the mechanisms provided in the current DDA for handling complaints is one of the key factors that have limited its effectiveness in reducing discrimination in Australian society over the past 20 years. While it is praiseworthy that the DDA provides a low-cost mechanism for complaint resolution through voluntary conciliation, the fact remains that ultimately only the courts can make enforceable decisions. Access to the court system is, in practice, available to only a small percentage of individuals who experience discrimination on the ground of disability. The main factor limiting access is the "costs follow the event" tradition in the court system, and the difficulty of obtaining expert legal advice.

65) It is unacceptable that the enjoyment of fundamental human rights such as freedom from discrimination should depend so heavily on one's economic circumstances. We completely reject the view that the operation of a costs jurisdiction limits the number of vexatious or trivial complaints. Lodging a complaint under anti-discrimination legislation is not an activity that most people take lightly. There is personal cost, both financial and emotional, involved, even when a complaint is pursued in the AHRC, and all those clients whom we have assisted to use the DDA have found the process stressful to varying degrees. Most individuals are intimidated by the prospect of the formality and adversarial nature of the court system, and this would still be the case if there were a no costs jurisdiction for dealing with discrimination complaints. Several of our clients have chosen to use the state or territory legislation because that offers a less intimidating way of reaching enforceable decisions, and we expect that this trend will continue if the current approach remains unchanged. This would be regrettable, given the variations and inconsistencies between the various state and territory anti-discrimination laws.

66) It is pleasing to note that a "cost cap" approach has been used in some recent DDA complaints, and that at least some judges recognise the inequality that exists between an individual and a well-resourced respondent in their capacity to pay. But without legislated certainty, very few of our clients will pursue a complaint through the courts. Some may not lodge a complaint at all, others accept conciliated settlements that do not fully deal with the substance of their complaints, while others have no choice but to withdraw their complaint or accept termination of their complaint by the AHRC in the event of failed conciliation.

67) If other changes are made during the consolidation process, such as changing the "burden of proof" requirements to a "reverse onus" model, then it might make it a little easier for individual complainants to pursue their discrimination complaints in the courts with less risk of an adverse finding, but unless there is a change to the costs element the courts will remain out of reach for most individuals who have a disability and who experience discrimination. We therefore strongly recommend that the current "costs follow the event" approach be changed when the courts deal with discrimination complaints brought under the consolidated legislation. One approach that we believe has much merit is outlined in the Submission in response to the Discussion Paper from the Discrimination Law Experts' Group (13 December 2011). There would be a "no costs" jurisdiction for discrimination complaints, but judges would have the power to award costs against corporate respondents in the event that a complainant was successful in proving unlawful discrimination.

Question 27. 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?

68) The DDA has had limited effect in reducing the amount of systemic discrimination that is experienced by people who are blind or have low vision or another disability. Discrimination is, by and large, only dealt with when an individual makes a complaint, and then only on an individual basis. Discrimination, direct or indirect, may continue for years before someone actually lodges a complaint. It is not uncommon for our clients to be told by a potential respondent, "well you're the first person who has mentioned this", the implication being that if discrimination were occurring, someone else would have complained about it before. Apart from the logical absurdity of this response, it does highlight the reality that the complaints-driven mechanism is often a blunt instrument in the face of systemic discrimination. Many websites remain inaccessible to people who are blind or have low vision because no-one has lodged a complaint about them under the DDA; organisations, including government departments and agencies, are introducing technologies into their public-facing services (for example, touchscreen-based queuing systems) that are inaccessible to people who are blind or have low vision, but until someone lodges a complaint under the DDA, this systemic discrimination is likely to continue.

69) There is an urgent need for a more effective alternative mechanism for reducing systemic discrimination that does not depend on individual complaints alone. The AHRC should be given greater powers to initiate complaints and investigate possible systemic discrimination. We are aware that a similar recommendation has been made on numerous occasions, including by the Productivity

Commission in their review of the DDA, and we are strongly of the view that the consolidation of the anti-discrimination legislation offers an opportunity to introduce such a change that should not be ignored.

70) Another improvement we would like to see in the role of the AHRC is in the enforcement of conciliated settlements. We know of numerous cases where a complaint lodged under the DDA has resulted in a conciliated settlement, but where the respondent has subsequently failed to abide by the terms of the settlement. Currently the only mechanism for dealing with a breach of a conciliated settlement is for the complainant to lodge a new complaint. In practice this rarely if ever happens, because complainants are very reluctant to go through the stressful and often lengthy process again—they are much more likely to just accept the breach of the settlement terms.

Question 28. Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti discrimination laws for managing the interactions with the Fair Work Act?

71) While we have had little direct experience with the effect on employment of the other anti-discrimination laws, we are able to say with confidence that the DDA has had quite limited success in reducing discrimination against people who are blind or have low vision in employment, and that pursuing complaints in this area is probably the most challenging and stressful for individuals. By the time a formal complaint of discrimination in employment is lodged, the relationship between the complainant and the respondent has often broken down, and complainants are experiencing considerable emotional and/or economic stress and insecurity.

72) In this context, the extra challenges of electing jurisdictions for lodging complaints, including grappling with the inconsistencies between the DDA and the FWA can impose considerable extra stress and uncertainty on individuals. We are therefore strongly of the view that as far as possible the consolidated legislation should remove inconsistencies between the current anti-discrimination legislation and the FWA, including by extending protections in the FWA that are not currently provided in anti-discrimination legislation (such as for nationality, political belief, and religion).

Question 29. Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws? 28

73) The beneficial objects of anti-discrimination legislation are best promoted by providing the maximum applicability of Commonwealth anti-discrimination legislation. We strongly support an approach that does not limit the application of the Commonwealth legislation, and therefore recommend that either there be no exemption from the legislation for acts done in compliance with state or territory laws, or that such exemptions be only on the basis of specific state and territory laws that are prescribed by regulation. The “prescribed laws” approach is currently used in the DDA, and substituting this with anything less (such as the blanket exemption contained in S.39(4) of the *Age Discrimination Act 2004*) would amount to a diminution of protection for people with disability.

Question 30. Should the consolidation bill apply to State and Territory Governments and instrumentalities?

74) We note that both the RDA and DDA already apply to state and territory governments and instrumentalities, and in the interests of preservation of existing protection, as well as of consistency, we would recommend that the consolidated legislation extend this application to all protected attributes.