

December 21 2012

**Submission to Senate Legal and Constitutional
Affairs Committee on Exposure Draft of Human
Rights and Anti-Discrimination Bill 2012**

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Submission to: **Committee Secretary**
Senate Legal and Constitutional Affairs Committee
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About Vision Australia

- 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 eight 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 (including library services)
 - 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. Vision Australia is also a significant employer of people

who are blind or have low vision, with 19% of total staff having a vision impairment.

- 5) 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 each year we work with over 33,500 people who are blind or have low vision, including people who are deafblind, 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.

Response to the Exposure Draft

Introduction

- 6) Vision Australia made comment on the Discussion Paper on the consolidation of Commonwealth anti-discrimination legislation that was released by the Australian Government in September 2011. Many of our comments mirrored those of other organisations, both in the disability sector and elsewhere. We are pleased that the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 that was released in November 2012 (hereinafter referred to as the “Draft Bill”) incorporates significant elements of the feedback that was provided during the initial consultation.
- 7) In particular, we welcome the introduction of a single test for discrimination, which will replace the complicated and confusing tests contained in the current *Disability Discrimination Act* (the “DDA”). We have every reason to be confident that the single test proposed in Part 2-2 of the Draft Bill will lead to greater certainty and clarity for all users of the legislation, and we strongly recommend its inclusion in the final legislation.
- 8) We also strongly support the extension of the scope of disability discrimination to include all areas of public life, rather than the list that is contained in the current DDA. This extension is in keeping with the Objectives of the Act, and is also more consistent with Australia’s obligations under the UN Convention on the Rights of Persons with Disabilities.
- 9) The reassignment of the burden of proof (S.124) is also a welcome inclusion in the Draft Bill. As we emphasise repeatedly in our earlier submission and also in

this one, individuals who experience discrimination are often at a significant emotional and psychological disadvantage when attempting to use the complaints-based mechanism, especially when confronted by corporate respondents who have extensive legal expertise, and whose multi-layered bureaucracy can filter out the personal effects and stress of pursuing a complaint. Some of this disadvantage will be mitigated by requiring respondents to assume a greater burden of proof than is currently the case.

- 10) In the remainder of this Submission we focus on several areas that we believe merit further consideration by the Committee as the Bill is examined prior to being finalised.
- 11) Our comments are derived from our interactions with clients, and focus on the experiences of real people who use (or would like to use) anti-discrimination legislation to help eliminate the discrimination on the ground of disability 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 legislation. Our perspective is about “how it is” for people, and for those of us who provide services, in using anti-discrimination legislation (especially the DDA) and how such legislation could most effectively achieve ameliorative outcomes for end-users.

Definition of “Assistance Animal”

- 12) The Draft Bill includes a tripartite definition of “assistance animal” in S.6. This definition is unchanged from the one provided in the DDA. We are aware that some concern has been expressed about the third element in the definition, which allows that a qualifying assistance animal need not be trained by an accredited or prescribed organisation. The concerns relate to the potential for animals that meet this aspect of the definition to be poorly-trained and not complying with appropriate standards of behaviour and hygiene when in a public place. It can be difficult to identify and address such issues when animals are in public places, for example, on a train or bus, and there is some concern that if instances of poorly-behaved or unhygienic animals are sufficiently numerous it will lead to some community backlash against assistance animals in general, at a time when people who use assistance animals such as Seeing Eye Dogs are still discriminated against by taxi drivers who refuse to take them or venues that will not accept them.
- 13) An alternative that has been proposed is that part (c) of the definition could be amended to make it mandatory that all assistance animals, howsoever trained,

must be accredited with respect to their public behaviour and hygiene, even if this accreditation does not extend to the actual training that is designed to alleviate the effect of a disability.

- 14) Whether the incorporation of such a change is warranted, given the potential inconvenience it might cause some users of assistance animals, will depend on the extent to which the current part (c) leads to unintended and undesirable outcomes, such as a significant number of assistance animals that are poorly-behaved or unhygienic. We are not aware of any research into this issue, and we recommend that the Government investigate and report on the extent of concerns and the impact of alternatives to part (c) of the current definition of “assistance animal”.

Exception for Justifiable Conduct

- 15) Section 23(2) of the Draft Bill introduces the concept of Justifiable Conduct. Discriminatory conduct is not unlawful if that conduct is justifiable. Conduct is justifiable if it is a reasonable and proportionate means of achieving a legitimate aim. S.23(4) enumerates the matters that must be taken into account when determining whether particular conduct is justifiable. They include the Objects of the Act, the nature and extent of the discriminatory effect, and alternative ways of achieving the legitimate aim that may have had a less discriminatory effect.
- 16) While we do not question the rationale for introducing this concept of Justifiable Conduct, we have concerns about how it might play out in practice, and recommend that it be closely monitored once the new Act becomes law.
- 17) Some complaints lodged under the DDA complaint process may involve technical matters that are beyond the expertise of most complainants to fully understand. This is particularly the case in areas such as website accessibility where there are very detailed technical guidelines that require web development expertise to comprehend. A complainant may not be aware of alternatives allowable under such guidelines, or even whether there are any alternatives at all.
- 18) Example: a web developer introduces a visual verification test (a CAPTCHA) on a website to help protect the site against hacking and spam. It is likely that such a measure would be considered by a reasonable person to be a legitimate aim, and the use of a Captcha would probably also be considered proportionate. A visual Captcha is completely inaccessible to a person who is blind. There are non-visual alternatives, but not all complainants will be aware of what is

technically possible—they know that they cannot access the Captcha but may not know what options are available to the developer in order to achieve the same (legitimate) aim.

- 19) Our concern is that a respondent may (whether perversely or not) claim that there are no less-discriminatory means of achieving a legitimate aim, and in the absence of technical knowledge, a complainant may feel unable to challenge this assertion, especially in the context of voluntary conciliation. Such complaints may never proceed to the Federal Court, and so discriminatory conduct may continue, even though (as in the Captcha example) there are in fact several readily-achievable solutions that have a less discriminatory effect.
- 20) We recommend that the Government closely monitor the operation of this exception for Justifiable Conduct, and we will be keen to assess its impact on the basis of the report produced pursuant to S.47 of the Draft Bill (which mandates a review of the Act's exceptions to be commenced within three years).

Investigation of Complaints

- 21) In our submission to the initial consultation we expressed deep concern about the current way in which complaints lodged under the DDA are dealt with, in particular that participation in conciliation on a voluntary basis can lead to undesirable outcomes because a perverse respondent may simply refuse to attend a conciliation conference or even to provide any response to the complaint. We are aware of specific complaints where these situations have arisen. The following paragraphs are edited from our previous submission, and are included here to highlight our ongoing concern about the nature of the conciliation process and also because we believe they are still relevant for the Committee's consideration.
- 22) 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. [The termination notice was subsequently revoked after representations from the complainant, but there was still no conciliation, and the complaint was finally terminated without a satisfactory resolution. The complainant felt that they had been treated unfairly by the process and that undue weight had been given to the corporate status of the respondent who, in the complainant's view, was permitted to ignore the objects of the Act and to take as long as they wished to respond to requests for additional information.]

23) 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.

24) 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 were insufficient to provide access. A technical report on the inaccessibility of the website was provided to the respondent by the complainant, but the respondent was, at the time, not inclined to make further changes. The AHRC suggested to our client that it would be appropriate to move towards terminating the complaint as the respondent was not prepared to make further changes to its website. The complainant believed that substantial progress could be made in a face-to-face conciliation conference, and strongly requested the AHRC to arrange a conciliation conference. Both parties participated, and the result was that a satisfactory resolution of the complaint was negotiated. But had our client not specifically requested that a conciliation conference be organised, or had the respondent not agreed to participate, the complaint would have been

terminated without a satisfactory outcome, and the discriminatory aspects of the respondent's website would have remained.

- 25) Under S.109(3) of the Draft Bill, the Commission may require parties to attend a conciliation conference.
- 26) We believe that this power must be used much less sparingly than the similar power that the Commission has by virtue of S.46PI and S.46PJ of the *Australian Human Rights Commission Act 1986*. The Objects of the Act will remain thwarted if the perception is allowed to flourish that a respondent can simply ignore a complaint alleging discrimination and it will, in most cases, eventually go away because most individual complainants will not be in a position to pursue the matter in the Federal Court. Conciliation by the Commission provides the most equitable and effective mechanism for resolving the majority of discrimination complaints, but only if this mechanism is seen by both complainants and respondent as robust in its application and credible in its outcomes.
- 27) We strongly recommend that the use and impact of the power conferred by S.109(3) be closely monitored by the Government during the first three years of the Act's implementation.

Closure of Complaints

- 28) We note that the Draft Bill strengthens the powers of the Commission to close complaints. While we recognise that it is undesirable that complaints are closed in some circumstances, we emphasise that it would be a most regrettable outcome if closure of a complaint were to become a substitute for vigorous attempts to achieve a conciliated settlement. In general an individual complainant's interests are not best served by premature closure of a legitimate complaint, owing to the very significant challenges in pursuing a complaint in the Federal Court. It would have the effect of increasing the powerlessness that many people already feel when experiencing discrimination, and it would undermine the credibility of the Commission as the national protector of human rights.
- 29) Even though the Draft Bill makes some welcome changes to the procedure for dealing with discrimination complaints in the Federal Court (providing for Commonwealth assistance in certain circumstances (S.130) and introducing, as a default, that each party should bear their own costs (S.133)) it will nevertheless remain the case that, in practice, access to the court system will be available to only a small percentage of individuals who experience

discrimination on the ground of disability. Pursuing court action requires physical and emotional stamina, access to expert legal advice that is often difficult or impossible to obtain (especially if the complaint relates to technical issues), and economic considerations (even meeting one's own costs can be prohibitive for many people). Most individuals are intimidated by the prospect of the formality and adversarial nature of the court system, and even lodging a complaint with the Commission is not a step that most people take lightly—all the clients we have worked with report varying levels of stress when pursuing a discrimination complaint.

- 30) Against this backdrop, we assert that the power to close a discrimination complaint is one that must be used judiciously and sparingly. We recommend that the use of this power be closely monitored by the Government and assessed in the report that results from the review conducted pursuant to S .47.

Representative Complaints

- 31) S.89 and S.98 of the Draft Bill outline a framework for the handling by the Commission of representative complaints. In theory, representative complaints should provide a mechanism for redressing discrimination that is less stressful and financially burdensome for individuals, since an organisation can pursue a complaint on behalf of its members. Our experience with the DDA suggests, however, that in practice representative complaints have had little success in reducing discrimination, especially at a systemic level. While the Commission may have considerable flexibility in handling representative complaints, the Federal Court has adopted a much narrower interpretation of who has “standing” in the context of a complaint on behalf of a class of people who may be affected by discrimination conduct. In *Access for All Areas Alliance Inc. (Hervey Bay) V. Hervey Bay City Council* ([2007], FCA 615) the court ruled that the Alliance did not have “standing” as an “aggrieved person”. The way this decision has been interpreted by the disability sector is that it is very difficult for an organisation to successfully pursue a complaint of disability discrimination on behalf of its members, both because it can be difficult to demonstrate that all members are equally affected by particular practices or conduct, and partly because an organisation (if it is incorporated) is a legal entity in its own right and therefore may only be entitled to pursue a complaint if the conduct affects it, as an entity.
- 32) As an example: although Vision Australia could lodge a complaint with the Commission on behalf of clients, alleging discrimination on the ground of disability, it is most unlikely that such a complaint would be sustained in the event that conciliation was unsuccessful and the matter proceeded to the

Federal Court. Most of Vision Australia's clients are not members of the Company in the legal sense and, in any case, our clients have varying degrees of vision impairment and so are unlikely to be equally affected by a particular practice or conduct.

- 33) In our view, the mechanism for handling representative complaints has largely failed because it is not consistent with the approach taken by the courts. If a representative complaint is lodged with the Commission, there is little chance that a failure of conciliation will trigger action in the Federal Court. In this context it is therefore essential that the Commission pursue conciliation with all vigour, including by reminding itself of its power to organise a compulsory conciliation conference.
- 34) We also strongly recommend that the Committee give serious consideration to providing a more certain mechanism for dealing with representative complaints of discrimination in the Federal Court.