



**SUBMISSION TO SENATE INQUIRY INTO  
HUMAN RIGHTS AND ANTIDISCRIMINATION BILL 2012  
(EXPOSURE DRAFT)**

**Prepared by  
COTA National Policy Office**

**December 2012**

**COTA Australia**

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## INTRODUCTION

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COTA Australia is the national policy arm of the eight State and Territory COTAs (Councils on the Ageing) 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. COTA takes a rights based approach to all of its work and one of our core principles is to promote positive views of ageing, reject ageism and challenge negative stereotypes. We work to combat ageism and age discrimination and see anti-discrimination legislation as an important tool to use in that fight.

COTA welcomed the Government's decision to consolidate the anti-discrimination laws as we saw it as an opportunity to strengthen the Age Discrimination Act 2004 (ADA). The ADA is the most recent piece of anti-discrimination legislation but is widely regarded as the weakest and has done little to reduce age discrimination in Australia. COTA also believes the complaints system needs simplifying so that people feel more able to take forward complaints; the process of complaints then informs community attitudes as it makes it clear that certain discriminatory behaviours are not acceptable.

COTA now welcomes the exposure draft of the Bill and the opportunity to put a submission to the Committee. In our Submission we focus on a few key issues that we believe the Committee should consider in its examination of the exposure draft. These include the move to a single definition of discrimination, changes to the complaints process around the onus of proof of discrimination and the inclusion of sexual orientation and gender identity as a protected attribute.

## ISSUES

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### **Definition of discrimination**

COTA supports the move to a simpler definition of discrimination (Clause 19) and supports the move to ensure the two forms of discrimination are not mutually exclusive and are equal.

We also support the removal of the need for a comparator as this has often posed problems for people in finding a suitable comparator and the 'fit' of the comparator was often questionable as two people's circumstances are never identical.

We support the intent of subclause 19(2) to define unfavourable treatment as we think anything which gives people a clearer understanding of what behaviours they can complain about is helpful.

We note there have been concerns raised about the inclusion of offence caused as unlawful behaviour particularly with regard to speech. The concerns centre on the possible impact this could have on free speech. Whilst accepting that this is included because it is in the current Racial Discrimination Act and the intent of the consolidated legislation is not to diminish any of the standards applying in the current Acts, COTA believes this is an area that needs more work to ensure there are not unintended consequences.

In terms of attributes, COTA particularly welcomes the move to allow discrimination on the basis of a combination of attributes which will allow people to demonstrate discrimination on individual attributes or as a result of the combination. Older women often raise with COTA that they feel discriminated against in the workplace because they are women and because they are older and this move would now allow them to do something about it.

### **Burdens of proof**

When discussing age discrimination older people often raise the question of how can they prove that they were discriminated against because of their age? This comes up frequently when people are looking at age discrimination in employment. Presently they have to prove that the behaviour is discriminatory but as it is often an attitude with no hard evidence to back it up it has been difficult for them to make a case.

The approach in the draft legislation to effectively share the burden of proof between the complainant and the respondent is welcome. Older people have told us that when they have raised the notion that they are being discriminated against on the basis of their age, particularly in the workplace, the response is often “well prove it”. These changes will make that easier and hopefully encourage more people to take action.

The person who is complaining about discrimination still has to make a case of what protected attributes they have and how the behaviours are discriminatory. Once this has been established we believe it is reasonable to then ask the respondent to explain their actions and to make a case as to why they are justified in terms of what the legislation would deem justifiable e.g. exemption or exception. We support this approach because discriminatory behaviour is about attitudes and only the person concerned understands why they are behaving in a particular way.

From our discussions with employers and employees around age discrimination in the workplace, it is clear that there is not a good understanding of the provisions of the current ADA and that people are often not aware that they are acting in an unlawful way. The combination of more people complaining and the need to justify their behaviour should mean they make the effort to better inform themselves and reassess their behaviours and policies.

## **Sexual orientation and gender identity**

COTA strongly supports the inclusion of sexual orientation or gender identity as protected attributes and that discrimination on the basis of either will be unlawful in any area of public life (subclause 22(1)). We note the concerns raised by the Australian Human Rights Commission in their submission around the narrowness of the definition and their recommendation to extend protection on the basis of a person's sex characteristics, intersex status or gender expression and encourage the Committee to examine these issues more closely.

However, we are disappointed that the draft legislation still gives religious organisations a broad range of permanent exceptions to allow them to discriminate on the basis of these attributes.

We note that the particular needs of older lesbian, gay bisexual, transgender and intersex (LGBTI) people are recognised and that aged care facilities will not be able to take advantage of the religious exceptions. This is consistent with the recently released Government's LGBTI Ageing and Aged Care Strategy and is welcomed by COTA.

COTA's preference would be that the legislation does not allow religious organisations to automatically be able to claim justification for discrimination against people because of sexual orientation or gender identity. We know that many religious based service providers do not avail themselves of the current range of exemptions and would probably continue to do so. Whilst we know there are resource implications if they were required to apply for temporary exemptions or similar processes, we think there is merit in looking at how this could be implemented.

## **Systemic discrimination**

The current anti-discrimination system is based predominantly on individuals bringing complaints that are dealt with on their merits. It relies on individuals having the capacity and financial resources to pursue a complaint.

In the COTA submission in response to the discussion paper on consolidating the anti-discrimination legislation earlier this year, we called for some mechanisms to address systemic discrimination. These could include representative complaints and giving the Commissioners powers to instigate inquiries where there is evidence of groups of people being discriminated against.

COTA is disappointed that the draft legislation does not address the issue of systemic discrimination and does not propose any measure to help deal with it.

## CONCLUSION

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Overall COTA supports the Human Rights and Anti-Discrimination Bill as we think the legislation meets its objective of making the law clearer and simpler and so easier for people to use.

Whilst there are some areas that need refining and some gaps e.g. the lack of measures to address systemic discrimination, COTA believes the draft legislation would give us a fairer and more accessible system that would provide greater protection against discrimination. Some of the outstanding issues can be dealt with by amending the legislation and others can be considered in the proposed three year review.

COTA believes that the proposed legislation will provide more protection against age discrimination as it raises the protections on age to the same level as those offered for other attribute, something we have long advocated.

COTA recommends that the Committee support the passage of the Bill.