SUBMISSION TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION ON AGE BARRIERS TO WORK IN COMMONWEALTH LAWS

Victoria Legal Aid
Lawyers And Legal Services

Victoria Legal Aid's specialist practice expertise

Victoria Legal Aid (VLA) is a major provider of legal services to socially and economically disadvantaged Victorians. We aim to provide improved access to justice and legal remedies to the community and to pursue innovative means of providing legal aid that are directed at minimising the need for individual legal services in the community. We assist people with their legal problems at locations such as courts, tribunals, prisons, and psychiatric hospitals as well as in our 15 offices across Victoria. We also deliver community legal education and assist more than 80,000 people each year through Legal Help, our free phone assistance service.

Research shows that a community that is inclusive, respectful of difference and intolerant of discrimination will be more socially cohesive, productive and will have better public health and education outcomes.[1] In 2011-2012 we provided legal advice and assistance in over 1,270 discrimination matters and our Legal Help telephone information service responded to 3,732 equality related queries. Our dedicated Equality Law Program holds weekly anti-discrimination law advice sessions and regularly provides advice and representation to clients who suffer discrimination, harassment, victimisation and vilification. We assist clients with complaints of discrimination in various jurisdictions, including the Federal Court and the Federal Magistrates Court, using various legislation, including federal anti-discrimination legislation, the *Fair Work Act 2009* (Cth) and the *Equal Opportunity Act 2010* (Vic).

Question 37

This submission responds to question 37 in the *Grey Areas – Age Barriers to Work in Commonwealth Laws, Issues Paper*, which asks:

> In practice, how effective are the general protections provisions under the *Fair Work Act 2009* (Cth) where a mature age employee, or prospective employee, has been discriminated against on the basis of age?

This submission is based on our practice experience and includes real client case studies. Names have been changed to protect the clients' privacy.

Difficulties of proof

It is our experience that clients who suffer even the most severe discrimination regularly decide not to make a formal complaint due to difficulty proving the conduct. This is primarily due to the following reasons:

- there are no witnesses to the discrimination, harassment or victimisation

[1] See, for example, R Wilkinson and K Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (2009); and VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report* (2007) at <http://www.vichealth.vic.gov.au/Programs-and-Projects/Freedom-from-discrimination/More-than-Tolerance.aspx>; Victorian Equal Opportunity and Human Rights Commission, *Economics of equality: An investigation in to the economic benefits of equality and a framework for linking the work of the Commission with its impact on the wellbeing of Victorians* (2010) at <http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=570:economics-of-equality&Itemid=690>.

- the witnesses are afraid of losing their jobs or of other negative ramifications if they support the complainant
- the complainant does not have access to the names or contact details of witnesses, or to other information and documentation that is in the possession and control of the alleged discriminator.

These problems have been referred to as the employer's 'monopoly on knowledge'.[2] The following case study illustrates the effect that this power imbalance often has on complaints of discrimination.

Case study one: *Mick's difficulty proving discrimination*

Mick is a 63 year old man who lost his job after 20 years of continuous employment. Mick applied for a job as a cleaner. After attending an interview and passing a medical examination he was offered and accepted the job. The company sent Mick the appropriate paperwork, which he completed and returned. The day after he sent in the paperwork the company said that Mick could no longer have the job. Mick was distressed because in the meantime he had turned down other work and he could not work out why he was now being told that he could not have the job. The only thing that had changed was that he had sent the company a copy of his driver's licence, which revealed his age. Mick suspected that the company had decided not to employ him because he is 63. He asked the company whether this was the case and, if not, why it had decided not to employ him, but the company refused to provide a reason.

Effectiveness of the general protections provisions in dealing with difficulties of proof

Courts and commentators have acknowledged that it is very difficult to bring successful claims of discrimination because the complainant is required to prove something that is in the knowledge of the respondent – namely the respondent's reasons for his or her actions – and for which there will often not be direct evidence available.[3]

The significant power imbalance resulting from the respondent's monopoly on knowledge is partly alleviated by the general protections provisions in the *Fair Work Act*. Under s. 361 of the *Fair Work Act* once the employee or prospective employee has established a prima facie case that age was the reason for any age-based adverse action taken against them by the employer, it is up to the employer to prove that age was not the reason for the adverse action.

This often makes the *Fair Work Act* a more effective avenue for recourse than other anti-discrimination legislation such as the Federal *Age Discrimination Act 2004*, which places the onus on the complainant to prove that the reason for any unfavourable treatment is age. In this respect s. 361 of the *Fair Work Act* represents a progressive solution to a problematic feature of other Australian anti-discrimination legislation, as illustrated in the second part to Mick's case study,

[2] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 180 and Laurence Lustgarten, 'Problems of Proof in Employment Discrimination Cases' (1977) 6 *Industrial Law Journal* 212, 213. See also Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' [2009] 31 *Sydney Law Review* 579, 583.

[3] For a thorough analysis of the problem and various legislative solutions to it see, Allen, Dominique "Reducing the Burden of Proving Discrimination in Australia" (2009) 31 Sydney Law Review 579.

below. Further, it is in line with the response to the problem of difficulty of proof in comparative jurisdictions such as the United Kingdom.[4]

Case study one continued: *Mick's claim under s 361*

Under the Fair Work Act, Mick could make a general protections application to Fair Work Australia alleging age discrimination in regard to a prospective employee. Once he had established a prima facie case, from which age discrimination could be inferred, if the company was not able to provide a compelling alternative reason for suddenly revoking the job offer, it would be presumed that the reason was age, as alleged by Mick. In the absence of s. 361, the company could simply stay silent as to its reason for revoking the offer, and in the absence of direct evidence of age discrimination Mick's claim would not be successful.

Other solutions to difficulties of proof

In addition, the following steps may assist to alleviate the significant power imbalance resulting from the respondent's monopoly on knowledge.

1. Statutory 'questionnaire procedure'

Complainants should have a statutory right to ask the respondent questions that are relevant to their allegations prior to conciliation, as is the case in discrimination complaint processes in the United Kingdom and Ireland. The response should be admissible as evidence, and courts should be able to draw an adverse inference from a failure to respond. In addition to assisting complainants, the questionnaire procedure can increase efficiency by enabling parties to better assess the merits of their case, leading to early settlement or withdrawal of a complaint.

2. Protection of witnesses and individuals who assist complainants

Witnesses are given only limited protection under the *Fair Work Act*. There should be explicit legal protection afforded to witnesses and individuals who assist complainants, including prior to any formal complaint being made. The following case study illustrates the difficulty that complainants experience when the witnesses to the discrimination are still working for the respondent employer. Fortunately, in this instance, there were two complainants and they managed to receive a favourable settlement.

Case study two: *Reluctant witnesses*

Christine and Beth are aged in their fifties. They worked as fruit packers for a fruit packing company. Without warning, and with no official reason older workers at the fruit packing plant had their per piece rates reduced and were no longer allowed to pack the more lucrative fruits, whereas younger workers were. Christine and Beth suspected that the older workers were being treated unfavourably because of their age.

Christine Beth and some other older workers made complaints of age discrimination under the Victorian *Equal Opportunity Act* ('Victorian Act'). The matter was unsuccessfully conciliated at the

[4] Sex Discrimination Act 1975 (UK) c 65, ss 63A, 66A; Race Relations Act 1976 (UK) c 74, ss 54A, 57ZA; Disability Discrimination Act 1995 (UK) c 50, s 17A(1C); Race Relations (Northern Ireland) Order 1997 NI 6, art 52A; Sex Discrimination (Northern Ireland) Order 1976 NI 15, arts 63A, 66A.

Victorian Equal Opportunity and Human Rights Commission. Christine and Beth's colleagues discontinued their proceedings following negotiations with the employer. They would no longer provide evidence for Christine or Beth for fear that their employer would punish them by firing them or reducing their shifts.

Due to the reverse onus provision in the *Fair Work Act* Christine and Beth decided to discontinue proceedings under the Victorian Act and make a general protections application to Fair Work Australia under the *Fair Work Act*. Unlike under the Victorian Act, under the *Fair Work Act* Christine and Beth obtained a favourable settlement, no doubt in part due to the reverse onus.

Multiple reasons for action

Section 360 of the *Fair Work Act* also has a positive impact on remedying age discrimination. It provides that where action is taken for multiple reasons that include a discriminatory reason, the action is considered to have been taken for the discriminatory reason. This provision is necessary to deal with discriminatory barriers to employment because age discrimination can often be subtle and disguised as conduct taken for other reasons.

The Federal Court's interpretation of the causal requirements of the general protections provisions in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 274 ALR 570 likewise addresses this issue. In this case the Court considered both the employer's individual reasons for taking the action, as well as any objective reasons that a third party might consider to be the motivating factor. However, the jurisprudence may soon change as this decision was appealed to the High Court, and judgment is currently reserved.

Conclusion

It is VLA's experience that, overall, the general protections provisions assist mature age workers with complaints of discrimination by addressing difficulties of proof and thereby helping to correct the employer's 'monopoly of knowledge'. In particular, the multiple reasons provision at s. 360, the reverse onus provision under s. 361 and the causal test applied by the Federal Court in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* have helped to alleviate the many impediments faced by individuals seeking redress for discrimination. In our experience, these features do not impose an unreasonable burden on respondents in that if the applicant cannot establish any evidential basis for discrimination, or if the respondent has a genuine non-discriminatory explanation for the adverse action, they will not be liable.

Recommendations

- Retain the key elements of the general protections provisions, including the multiple reasons provision at s. 360, the reverse onus provision under s. 361 and the causal test applied by the Federal Court in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 274 ALR 570.
- Introduce a statutory 'questionnaire procedure', through which a complainant can obtain relevant information prior to conciliation. The response should be admissible as evidence, and courts should be able to draw an adverse inference from a failure to respond.
- Include explicit protection in the *Fair Work Act* for witnesses and individuals who assist complainants, including assistance provided prior to any formal complaint being made.