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Ms Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Dear Ms Wynn

Thank for you providing us with the recent opportunity to meet with your President, Professor Rosalind Croucher and legal officers to comment on the *Grey Areas – Age Barriers to Work in Commonwealth Laws* Discussion Paper. The South Australian Equal Opportunity Commission frequently receives enquiries and complaints from people who have experienced discrimination in the workplace on account of their age.

Insurance

Our previous submission highlighted the barriers to accessing insurance products and the detriment experienced by mature age workers. We note that submissions from insurance industry representatives to the discussion paper suggest that only 30% of Australians take out income protection insurance. However, a mature age worker who is a sole trader or who is self employed is significantly impacted by the inability to protect their income.

Case studies:

- *I am a self-employed primary producer now aged 69 years, and cannot access accident or illness insurance to cover me at work. I was told I was too old for illness insurance, but could get some cover for accident insurance at greatly reduced benefits up to the age of 70. I have therefore been working full time without any illness cover for 5 years, and soon will have no accident cover either when I turn 70. I have a clean bill of health each year from my GP which I submit to the insurance company. The government encourages us to work after retirement age, but does not care that insurance companies say we are uninsurable.*
- *I am self employed and have my own work related personal insurance cover. When I turn 65 next year I will no longer be able to be covered. This will force me out of the workforce.*

Insurance companies rely upon exemptions from anti-discrimination legislation, such as section 85R(2) of the *Equal Opportunity Act 1984* (SA) which enable companies to discriminate on the basis of age where the discrimination is based on actuarial or statistical data from a source upon which it is reasonable to rely. Those individuals who seek and are

denied insurance have little or no power to appeal to insurance companies on account of the inflexibility of the industry. Also, the lack of transparency and the imbalance of power compounds the disadvantage experienced. A more transparent industry would enable those seeking insurance to be provided with and understand the reasons behind any refusal.

One way of achieving this would be for the current burden of proof to be reversed and any adverse decision based upon a ground protected by anti-discrimination legislation, such as age, should be assumed to be discrimination unless the insurance company provides evidence to rebut that presumption. This would have the effect of increasing transparency and ensuring insurance companies are held to account for their decision to discriminate on the basis of age.

In addition, the insurance industry could consider market segmentation for people over 65 and offer a range of products to reflect age cohorts. Currently, there is a tendency to treat people over 65 years of age homogeneously and not respond to market segments like they do for younger people. As people are now living longer and are healthier for longer, the historical age of 65 being indicative of a significant life change or sudden diminution, is declining in relevance. Whereas, if people over 65 years of age were considered in 5 year cohorts, and relevant actuarial data applied, the risks for insurance providers to offer more products reflective of the risk for the cohorts would reduce. This could result in a broader range of affordable products that could be graduated in price and insurance cover as risks/or actuarial data demonstrates an increase.

The issue with this approach is the ongoing use of age is the key determinant in someone's ability to access and/or secure certain services rather than state of health, ability, capacity or some other determinant. However, if age continues to be used, then market segmentation for the post 65 years of age group into 5 year cohorts for example, could provide a greater range of insurance products at affordable prices rather than the sudden cut off that dominates the market now. Whilst there are some insurance providers who adopt this, it not a widespread approach.

Therefore the use of actuarial data to discriminate against age for insurance products should be analysed in age cohorts to better reflect current capacity of people in those age groups and ensure discrimination exemptions are applied appropriately and progressively rather than as a blanket approach at age 65 years.

Recruitment

In our previous submission we suggested that it may be effective to introduce regulations or compliance codes that preclude recruitment agencies from asking for certain information such as date of birth and history of Workcover claims. Further, additional education and training regarding non-discriminatory recruitment practices for the industry would be beneficial.

The discussion paper proposes that targets be applied to recruitment agencies regarding the number of mature age workers employed and that these targets be enforced through the audits and investigations. The use of targets may be an effective measure but may be more effective if applied to the number of mature age workers placed in employment rather than the number "on the books" of a recruitment agency.

The proposed audit and investigation process could be coupled with recognition of those agencies adopting and demonstrating best practice. We agree with the Australian Law Reform Commission's proposal that a form of accreditation and the receipt of awards to recognise those that successfully achieve their targets should be considered.

Case studies:

- *I have had several incidents of job applications where I have been shortlisted and invited for interview. At this time they request drivers licence or other evidence of identity. This, of course, includes my date of birth (which I do not put on my resume). In all instances, I have not been offered the job. Some of these were government departments. I have also given up on recruitment agencies because, despite good phone rapport, the whole thing goes downhill when I go for an interview.*
- *At 56, it is affecting my ability to remain employed. I am now wiser, more experienced and more educated than ever, having just finished a masters degree, and certainly more able to do the work I apply for. Yet there is a belief that a younger, less experienced person, is better for the job. Sadly, I need to remain employed for as long as possible because I am simply not able to consider retirement.*

Employment

The discussion paper poses a question with regards to the general protections clause in the *Fair Work Act 2009*. The General Protections clause provides an important avenue for recourse for those who have been discriminated against in the workplace. The reverse onus of proof, as compared to anti-discrimination legislation, reflects the power imbalance between an employer and employee.

In our previous submission we raised the issue regarding the retirement age being outdated. Many mature age workers wish to continue working past 65, but are 'phased out' (or forced out) by management. The following case study is an example of employers assuming an employee's future intentions:

- *I'm 67, and while I was on annual leave I was removed from a managerial position by the CEO. There was no consultation or negotiation about this, I was told that it was to 'ease me into retirement'. I complained, but it didn't do any good, no action was taken.*

Mature age workers are still stereotyped in the workplace with employers assuming that employees intend to retire once they turn 65. Furthermore, we receive enquiries and complaints about instances where mature age workers are overlooked for employment opportunities because of their age. Below is a fairly typical complaint or enquiry that we receive:

- *Despite upgrading my qualifications and having an exceptional teaching record I was refused permanent employment in favour of younger employees. At 65 my mental capacity and energy levels have not decreased as I have aged. I did not complain, as I did not think it would do any good.*

Increased education and resources regarding what constitutes age discrimination could be a constructive way to encourage employers to tackle this issue in their workplace. We would also support the continuation of awareness raising regarding the imperative fiscal contribution mature age workers make to the Australian economy, a contribution that is becoming more and more vital in light of our ageing population.

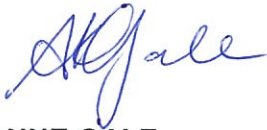
Conclusion

We see many instances of discrimination on account of a person's age and are often unable to assist due to legislation that effectively compounds the barriers to employment for older

people. It is encouraging to see that the Australian Law Reform Commission is examining this area with a view to introducing much needed change and we fully support this work.

If you would like any further information regarding the above submission, please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in blue ink that reads "AGale". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

ANNE GALE
COMMISSIONER FOR EQUAL OPPORTUNITY