



Australian Government
Department of Immigration and Citizenship

Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Sir/Madam

Submission – Grey Areas – Age Barriers to Work in Commonwealth Laws

The Department of Immigration and Citizenship (the department) welcomes the opportunity to comment on the Australian Law Reform Commission's (ALRC) discussion paper entitled *Grey Areas – Age Barriers to Work in Commonwealth Laws*.

Please find below the department's submissions in respect of key points arising in the discussion paper.

Consistency with Commonwealth Anti-Discrimination Legislation

At paragraph 9.1 on page 197 of the discussion paper, the ALRC states the following:

The skilled migration program is selective and discriminates between applicants on the basis of a range of criteria, including age, to determine which applicants are likely to make the greatest economic contribution. While such an approach does not necessarily sit easily with the position under Australian law – that discrimination on the basis of age is unlawful – for a number of reasons, the ALRC does not propose reforms in this area.

The department notes that there is no inconsistency between Australia's skilled migration policy and Commonwealth anti-discrimination legislation. The *Age Discrimination Act 2004* (Cth) (the ADA) contains an exemption to its anti-discrimination provisions at section 43 to the effect that anything done in relation to the administration of the *Migration Act 1958* or the *Immigration (Guardianship of Children) Act 1946* or a regulation or any other instrument made under either of those Acts will not be unlawful. Subsection 43(2) of the ADA also exempts anything done by a person in direct compliance with the *Australian Citizenship Act 2007* (Cth) and the *Immigration (Education) Act 1971* (Cth).

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Issues

The department notes the following at paragraph 9.3 on page 197 of the discussion paper:

The ALRC is informed by stakeholder submissions emphasising that: there are policy reasons for retaining age as a criterion; there are a range of skilled visa options for potential migrants, only some of which contain age restrictions, and points tests and exemptions operate to the benefit of highly skilled applications regardless of age; and the Australian Government's priority should be on developing an Australian skilled labour supply.

Further, the discussion paper poses a number of questions/issues for consideration including:

1. Should age limitations be increased or removed?
2. Age and the structure and operation of the skilled visa program; and
3. Australian labour supply and market.

Response

The department recognises that there are significant benefits of age and work experience, particularly for highly skilled professionals.

However, the prospect of a major decline in the size of the working age population is a problem facing many western countries and, as a result, it is noted that several countries including those mentioned in the discussion paper (New Zealand and Canada) are starting to develop planned and balanced migration arrangements similar to Australia's program.

The department submits that Australia's skilled migration program is carefully managed so as to yield the maximum benefit for the Australian community serving a range of economic, social and demographic objectives.

Demographic research indicates that, in the near future, our ageing population will also begin to act as a constraint on the supply of younger skilled workers. The department's planned migration program will help address skills shortages. It will also off-set the major decline in the size of Australia's working age population, which would otherwise begin to affect the Australian community in a few years time, as the majority of the "baby boomer" generation moves into retirement.

In February 2010, the Australian Government announced a series of reforms to the skilled migration program which commenced on 1 July 2012. These reforms were designed to deliver a more responsive and targeted skilled migration program. One of the key reforms announced was the review of the points test used to assess skilled migrants.

The Australian Bureau of Statistics data and the department's own research indicates that highly skilled migrants, who come to Australia between the ages of 25-32, add the most benefit to the Australian economy in terms of lifetime earnings. However, as a result of the Government's strategic reform towards a demand-driven migration program, the age criterion was reviewed, with the maximum age threshold for applicants raised from forty-five years of age to forty-nine. This increase in the age limit recognises that significant work experience is a key factor in determining a skilled migrant's labour market performance.

On 1 July 2012, a number of reforms to the permanent Employer Nomination Scheme (ENS), Regional Sponsored Migration Scheme (RSMS) and Business Innovation and Investment program, commenced.

One of the reforms implemented was an increase in the age limit from forty-five years of age to less than fifty years of age under the ENS or RSMS, where a person is nominated by an Australian employer for permanent residence. Depending on their occupation, salary and past work experience, the Employer Nomination Scheme and the Regional Sponsored Migration Scheme distinguishes the benefits of age in applicants with extensive work experience by exempting applicants from the age limiting provisions. For example, high income applicants, who would not normally meet the age requirement and who have been working for their nominating employer on a Subclass 457 (Business (Long Stay)) visa for at least four years, are exempt from the age requirement.


The Business Innovation and Investment program permits applicants of *any* age to apply. However, applicants over the age of fifty-five require nomination by a State or Territory government agency on the basis that the agency considers that the applicant's proposed business or investment activity will be of exceptional economic benefit to the State or Territory in which the agency is located. The Business Innovation and Investment program recognises the period of time required to establish a successful business, the comparative lifetime earnings and total federal budget impact of applicants of various ages. On this basis, the innovation points test applied to the program awards a different amount of points for different age profiles.

The Subclass 457 (Business (Long Stay)) visa program enables employers to sponsor applicants to meet skill shortages that cannot be supplied domestically within Australia. The Subclass 457 (Business (Long Stay)) visa program does not impose any age limitations or barriers, and as such does not restrict mature age persons from participating in the Australian workforce. The department welcomes the ALRC's finding that the exemptions available in the Subclass 457 (Business (Long Stay)) "...strike an appropriate balance between valuing the skills and experience of mature age workers in line with the underlying objective of filling labour skills shortages"¹.

Recommendations

The department supports the ALRC in its recommendations that no changes be made to the age limits under Australia's skilled migration framework.

Yours sincerely



Martin Bowles PSM
26 Nov 2012

¹ Australian Law Reform Commission, *Grey Areas – Age Barriers to Work in Commonwealth Laws*, (2 October 2012, Sydney, Australian Law Reform Commission) at p. 202.