

**SUBMISSION TO THE AUSTRALIAN LAW REFORM
COMMISSION**

AGE BARRIERS TO WORK IN COMMONWEALTH LAWS

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About Victoria Legal Aid

Victoria Legal Aid 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 have better public health and education outcomes.¹

In 2011-12, Victoria Legal Aid provided legal advice and assistance in over 1,270 discrimination matters and our Legal Help telephone information service responded to 3,732 discrimination and employment 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).

Age Barriers to Work

We welcome the opportunity to make a further contribution to the Australian Law Reform Commission's (ALRC) review into legal barriers to older persons participating in the workforce or other productive work. The ALRC has been requested to report on:

- the identification of Commonwealth legislation and legal frameworks that contain or create barriers to older persons participating, or continuing to actively participate, in the workforce or in other productive work (paid or unpaid), and
- the question of what, if any, changes could be made to relevant Commonwealth legislation and legal frameworks to remove such barriers.

The ALRC has been requested to consider all relevant Commonwealth legislation and related legal frameworks that either directly, or indirectly, impose limitations or barriers that could discourage older persons from participating or continuing to participate in the workforce or other productive work, including

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.humanrightscormission.vic.gov.au/index.php?option=com_k2&view=item&id=570:economics-of-equality&Itemid=690>.

- (a) superannuation law
- (b) family assistance, child support, social security law and relevant government programs
- (c) employment law
- (d) insurance law
- (e) compensation laws, and
- (f) any other relevant Commonwealth legislation exempt under the *Age Discrimination Act 2004*.

Submission to the Issues Paper (IP 41)

We previously provided a submission on the effectiveness of the general protections under the *Fair Work Act 2009* (the Fair Work Act) where a mature age employee, or prospective employee, has been discriminated against on the basis of age (Issues Paper – Question 37). In that submission, we outlined the difficulties of proof in discrimination matters, the effectiveness of the general protections provisions in dealing with difficulties of proof and proposed a number of other solutions for dealing with the difficulties of proof.

We made the following recommendations based on our practice experience and supported by case work examples:

- Retain the key elements of the general protections provisions, including the multiple reasons provision at section 360, the shifting onus provision under section 361 and the causal test applied by the *Federal Court in Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2001) 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.

Discussion Paper (DP 78)

The ALRC released a discussion paper in October 2012 outlining issues for reform.

Our submissions are cited in the discussion paper.

We continue to support the position adopted in our submission to the discussion paper and below make further comment on the following issues:

- the relationship between anti-discrimination laws and the Fair Work Act;
- further comments about multiple reasons for action under the general protection provisions;
and
- insurance and workforce participation for older persons.

Summary of Recommendations

Recommendation 1: That the Fair Work Act establish a formal process for the identification and examination of systemic issues of discrimination raised by industrial instruments and workplace agreements.

Recommendation 2: That Fair Work Australia conduct a review of industrial instruments that may directly or indirectly discriminate against people on the basis of a protected attribute, including age.

Recommendation 3: That the public information available to potential complainants to assist them to understand and evaluate the available options for pursuing complaints of discrimination be improved.

Recommendation 4 : That the impact of insurance arrangements on the workforce participation of mature age workers be examined.

Recommendation 5 : That a legislative amendment be considered to clarify that an employer's individual reasons for taking the action and any objective reasons that a third party might consider to be the motivating factor can be considered when examining the casual requirements of section 360 of the Fair Work Act.

Relationship between anti-discrimination laws and the Fair Work Act

The Discussion Paper invites comments on the overlap between the general protection provisions under the Fair Work Act and Commonwealth anti-discrimination legislation. In particular, the Discussion Paper requests advice on ways that the interaction of this legislation could be improved in circumstances of age discrimination.

Increased functions to support the identification and elimination of systemic issues

There are a broad range of inquiry and investigation powers available to the Australian Human Rights Commission (the Commission) under Commonwealth anti-discrimination legislation. These powers are designed to facilitate systemic improvements to prevent discrimination. There are no equivalent powers under the Fair Work Act.

In addition to receiving complaints of unlawful discrimination, the Commission can inquire into complaints of breaches of human rights and workplace discrimination under the *Australian Human Rights Commission Act 1986*. If conciliation is unsuccessful or inappropriate and the Commission finds that there has been a breach of human rights or workplace discrimination has occurred, the Commission has the power to prepare a report of the complaint, including recommendations for action, for the Attorney General. The report must be tabled in Parliament.

Given that the general protection provisions under the Fair Work Act provide an attractive avenue to pursue a complaint about unlawful discrimination, it is important that the opportunity to make systemic improvements following the identification of issues of discrimination is not lost. This should be the case even where the conduct is protected by one of the exceptions, for example where the conduct is authorised by an industrial instrument.

Accordingly, we support a process under the Fair Work Act to refer systemic issues to the Fair Work Ombudsman for consideration, inquiry and report. Alternatively, we support a process under the Fair Work Act to refer matters that raise systemic issues of discrimination to the Australian Human Rights Commission. However, additional resources will be required to facilitate meaningful examination of any systemic issues through this proposed process.

Recommendation 1: That the Fair Work Act establish a formal process for the identification and examination of systemic issues of discrimination raised by industrial instruments and workplace agreements.

The anti-discrimination laws already contemplate a role for Fair Work Australia in addressing discriminatory terms in industrial instruments. This role will continue under the proposed Human Rights and Anti-Discrimination Bill 2012. Clause 102 of the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 provides for the referral of industrial instruments in connection with a complaint. Clause 102 provides that if the Commission receives a complaint and considers that the conduct to which the complaint relates would be unlawful discrimination, but for the fact that the conduct is necessary to comply with an industrial instrument, the Commission must refer the instrument to Fair Work Australia.

In addition, Fair Work Australia is not supposed to certify agreements that include discriminatory terms.²

We support the creation of a formal mechanism for Fair Work Australia to identify and review industrial instruments and workplace agreements that may include discriminatory terms. This will enable individual claims to inform positive systemic change.

For example, we are aware of discriminatory terms in workplace agreements that relate to age. In particular, some workplace agreements contain a term requiring the employer to insure employees for income protection. Certain employees will not be eligible for income protection due to their age. Such provisions have a discriminatory effect on older employees and may impact their ability to remain in the workforce.

Case Study - Insurance, older workers and workforce participation

We acted for an older person who had worked in the construction industry for about 40 years. The person was employed as a general labourer.

When Glen reached the age of 70, he attended a meeting with his employer and union representatives. At that meeting, Glen was informed that it would be his last day of work and that it was time to give younger people some opportunities. He was told that it was a bad look for the union for him to continue to work beyond the pension age when the union was advocating against the raising of the pension age.

There were a number of issues relevant to our clients circumstances. One of them was that the workplace agreement included a term that required the employer to provide employees with income protection insurance. There were a range of exclusions to the insurance policy. The insurer would not cover employees aged over 70. Because of this, Glen could not access income protection insurance as required by the workplace agreement. Glen was willing to keep on working without insurance but his employer considered that this would be in breach of the workplace agreement.

Glen wanted to keep on working but felt he had no choice but to sign the paperwork confirming his resignation.

² *Fair Work Act 2009*, sections 186(4), 194 and 195.

Glen made a complaint of age discrimination. In the end, Glen reached a settlement agreement with his former employer.

In our view, it is desirable to create a formal process in the Fair Work Act for the identification and examination of broader systemic issues of discrimination raised by industrial instruments and workplace agreements. We consider that Fair Work Australia should adopt a proactive approach to the identification and elimination of discriminatory terms in industrial instruments.

Recommendation 2: That Fair Work Australia conduct a review of industrial instruments that may directly or indirectly discriminate against people on the basis of a protected attribute, including age.

Choice of jurisdiction

Earlier this year, we made a submission to the Commonwealth Harmonisation of Anti-Discrimination Laws project. In that submission, we noted that due to the complexity of Australian anti-discrimination law and the various options for legal redress that are available, it is common for clients to make a complaint under legislation that is not the most appropriate to the subject matter of their complaint.

In 2011, we provided information and advice in over 1000 discrimination matters. A number of these clients were already obstructed from pursuing the most beneficial course of action because they had already lodged a complaint in one jurisdiction and were statutorily barred from initiating a complaint in a more appropriate forum. Similarly, in some cases the statutory limitation period had passed by the time these people accessed specialist legal advice.

Under Commonwealth anti-discrimination laws, if a complaint is lodged under a state and territory law and a person has already made a complaint or instituted a proceeding under that law, recourse to the Commonwealth anti-discrimination statutes is not permitted.³ Similarly, if a complaint is made under the Fair Work Act, it will not be considered under Commonwealth anti-discrimination laws.

The Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 proposes to reproduce this statutory bar. Accordingly, where a person makes a complaint under Part 3-1 of the Fair Work Act or under state and territory laws, they will not be able to pursue a discrimination complaint under Commonwealth anti-discrimination laws unless there are exceptional circumstances. No legislative guidance is provided in relation to what matters may constitute exceptional circumstances.

Therefore, the choice of jurisdiction will remain a significant issue for potential complainants and may result in less favourable outcomes for individuals in some cases.

One practical improvement that could be made to assist potential complaints would be to update and simplify the information available on the National Anti-Discrimination Information Gateway to assist people, particularly those who do not have legal representation, to understand and evaluate the available options. For example, an aggregated comparative table setting out the protected attributes, requirements and limitations and the available remedies under the respective statutes would assist potential complainants to make this assessment. The future enactment of the Human

³ s 6A(2) Race Discrimination Act; s 10(4) Sex Discrimination Act; s 13(4) Disability Discrimination Act ; s 12(4) Age Discrimination Act.

Rights and Anti-Discrimination Bill 2012 will provide a timely opportunity to reassess the public information available in relation to pursuing complaints of unlawful discrimination.

We support this information being developed in consultation with legal service providers who have direct experience responding to requests for information from people wanting to pursue complaints of discrimination.

Recommendation 3: That the public information available to potential complainants to assist them to understand and evaluate the available options for pursuing complaints of discrimination be improved.

Insurance and workforce participation for older persons

We support the closer examination of the impact of insurance arrangements on the workforce participation of mature age workers (Proposal 4-1). We agree with the submission of the South Australian Equal Opportunity Commission that age limits in insurance products can work to prevent capable people from participating fully as a member of society.⁴ This position is supported by the example from our casework outlined above.

Recommendation 4: That the impact of insurance arrangements on the workforce participation of mature age workers be examined.

Multiple reasons for action

In our submission to the Issues Paper, we noted that section 360 of the Fair Work Act 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. We submitted that 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.

Our submission expressed support for 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. 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. Since our submission to the Issues Paper, the High Court has now allowed the appeal against the decision of the Federal Court. Accordingly, the benefit of this jurisprudence to the interpretation of this section of the Fair Work Act has dissipated. We would support a legislative amendment to embed the approach adopted by the Federal Court as the correct test to be applied to ensure that impediments faced by people seeking redress for discrimination are minimised.

In our experience, these features do not impose an unreasonable burden on respondents.

Recommendation 5: That a legislative amendment be considered to clarify that an employer's individual reasons for taking the action and any objective reasons that a third party might consider to be the motivating factor can be considered when examining the casual requirements of section 360 of the Fair Work Act.

⁴ Grey Areas – Age Barriers to Work in Commonwealth Laws, p 102

