



THE LAW SOCIETY
OF NEW SOUTH WALES

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Professor Sally Walker
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By Email: catherine.emami@lawcouncil.asn.au

Dear Professor Walker

ALRC Discussion Paper "Age Barriers to Work in Commonwealth Laws"

Thank you for seeking the view of the Law Society of New South Wales in developing a Law Council submission in response to the Australian Law Reform Commission (ALRC) Discussion Paper. The Law Society's Employment Law Committee (Committee) has provided the comments set out below.

The Law Council's memorandum dated 4 October 2012 notes that the Discussion Paper is seeking further information in relation to Commonwealth legislation and legal frameworks on a number of matters set out at paragraph 4. Those matters concern legislation and policy provisions relating to recruitment and employment law, work health and safety and workers' compensation, insurance, social security, superannuation and exemptions under the *Age Discrimination Act 2004* (Cth) (AD Act). The Committee's comments however relate only to the matters at sub-paragraphs (a), (b) and (f) pertaining to employment, work health and safety and workers' compensation and exemptions under the AD Act respectively.

"(4)(a) Recruitment and employment law, such as the effectiveness of the general protection provisions in the *Fair Work Act 2009* relating to age discrimination;"

This sub-paragraph, in general terms, raises the subject matter of questions 2-1, 2-2 and 2-3 of the Discussion Paper. The Committee's response to each of these questions is set out below.

"Question 2-1: In what ways, other than through changes to the *Fair Work Act 2009* (Cth), should the Australian Government develop or encourage flexible working arrangements for mature age workers?"

The Committee supports the proposed change to the *Fair Work Act 2009* (Cth) (FW Act), being an amendment to section 65 to extend the right to request flexible working arrangements to all employees who have caring responsibilities (Proposal 2-5). The Committee agrees with the ALRC's assessment at paragraph 2.64 that if this right was extended to mature age workers only, this would act as a disincentive to employment of these workers.

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For similar reasons, the Committee does not support the proposed amendment to section 117(3)(b) of the FW Act to increase the minimum period of notice for termination of an employee who is over 45 years of age and has completed at least two years of continuous service, from the current additional one week to an additional four weeks (Proposal 2-8).

The Committee considers that other ways the Australian Government could develop and encourage flexible working arrangements for mature age workers include implementing such arrangements in the federal public sector, in keeping with an amended section 65 of the FW Act.

The ALRC, at paragraphs 2.132 and 2.133, also recommends a co-ordinated whole of government approach to education and awareness and the Committee supports this recommendation.

The Committee also supports the proposal that the Australian Human Rights Commission lead a national campaign in support of the workforce participation of mature age people (Proposal 2-12).

In this context, the Committee supports the proposal that the Fair Work Ombudsman develop a guide to negotiating and implementing flexible working arrangements for mature workers (Proposal 2-6) and that Fair Work Australia, in the course of its first four yearly review of modern awards, consider the inclusion or modification of terms in the awards to encourage workforce participation of mature age workers (Proposal 2-7).

“Question 2-2: There is substantial overlap between the general protections provisions under the *Fair Work Act 2009* and Commonwealth anti-discrimination legislation. In what ways, if any, could this legislation be amended to improve or clarify their interaction in circumstances of age discrimination?”

The Law Council's submission to the ALRC Issues Paper commented on the overlap and identified some of the problems arising from it. That submission incorporated the Committee's earlier comments to the Law Council. As the ALRC Discussion Paper states at paragraph 2.95 “this issue is being discussed in the context of the consolidation of Commonwealth anti-discrimination law”. The Australian Government is currently drafting consolidated anti-discrimination legislation. It is difficult for the Committee to comment further in the absence of that draft, though it may do so upon its release.

“Question 2-3: Should the Australian Government establish a body or reporting framework with respect to mature age workers similar to that of the Equal Opportunity for Women in the Workplace Agency or its reporting framework? If so, how should such a body or framework operate?”

The Committee does not support the establishment of a reporting framework or an additional regulatory agency monitoring mature age workers at this stage. The Committee suggests that changes in attitude towards the employment of mature age workers and in the actual number employed might result from efforts to increase employers' and employees' awareness of their rights and obligations under the law, together with knowledge of existing remedies available for those who consider they have been discriminated against because of their age. In this context, Proposal 2-12 referred to above is supported.

While the general principle favoured by the ALRC of individual capacity-based assessment rather than the imposition of compulsory retirement has much merit, for the reasons the ALRC sets out in paragraphs 2.106 and 2.109, the Committee does not favour the removal of compulsory retirement ages for judicial and quasi-judicial appointments.

“(4)(b) Work health and safety and workers’ compensation, such as the introduction of a supplementary payment for mature age workers similar to that provided under the *Workers’ Rehabilitation and Compensation Act 1988* (Tas);”

The Discussion Paper asks this question specifically at question 3-2:

“Question 3-2: Should the Australian Government introduce a supplementary payment for mature age workers similar to the one provided for under the *Workers’ Rehabilitation and Compensation Act 1988* (Tas)?”

The Committee has reservations about the adoption of a supplementary payment for mature age workers and does not consider that it is a necessary step in addition to the two nominated by the ALRC (ensuring that retirement provisions are legislatively tied to age pension age and the potential extension of the incapacity payment period). The Committee does not have specific knowledge about the operation of the Tasmanian legislation. However, the Committee considers that payment of a weekly supplementary payment after usual incapacity payments have ceased, in circumstances when a worker can prove that he or she would have continued working after the age of 65 had they not been injured, could operate as a barrier to employment of mature age workers because employers may anticipate an additional cost.

Concerning volunteer coverage, the Committee supports the proposal that Safe Work Australia’s Strategic Interest Group on Workers’ Compensation should consider the definition of ‘worker’ under Commonwealth, state and territory workers’ compensation legislation to ensure consistency of coverage of volunteers (Proposal 3-7).

“(4)(f) Exemptions under the *Age Discrimination Act 2004* (Cth)”

This sub-paragraph is related to the content at (4)(c) regarding insurance and raises the subject matter contained in questions 4-2 and 4-3 of the Discussion Paper. Those questions and the Committee’s responses are as follows:

“Question 4-2: In the course of the consolidation of the federal anti-discrimination legislation, the Australian Government is considering the operation of the insurance exemption under the *Age Discrimination Act*. If the specific exemption is retained, what changes, if any, should be made? For example, should:

- (a) the application of the exemption be limited in some way;
- (b) there be provision for an individual to request and receive the actuarial or statistical data on which the action or decision was based; or
- (c) clarification be provided as to what are ‘other relevant factors’?”

Generally, the Committee considers that insurers ought to be required to apply for a specific exemption or show why an applicant over 65 years should not be covered by an insurance policy. The Committee favours this approach rather than the present exemption whereby insurers may discriminate on the grounds of age in offering an insurance policy or the terms and conditions upon which the policy is offered, if specified conditions are met in accordance with section 37 of the AD Act. In submissions on the consolidation of the Commonwealth anti-discrimination legislation, the Law Council has advocated consistency in the terms of exceptions and exemptions to discriminatory conduct and the Committee supports this approach.

The ALRC at paragraph 4.85 highlights a difference between the AD Act and the *Sex Discrimination Act 1984* (Cth) in that the latter requires insurers to disclose actuarial or statistical data to the customer that it relied upon for the purposes of an exemption, while the former does not. It is not clear why there is this difference in approach and the Committee considers that the relevant information should also be a required disclosure under the AD Act.

"Question 4-3: Is the power of the Australian Human Rights Commission under s.54 of the *Age Discrimination Act* sufficient, or should there be some other mechanism for requesting or requiring the actuarial or statistical information relied upon by insurers seeking to invoke the insurance exemption?"

Section 54 allows the President or the Australian Human Rights Commission to require the disclosure of the source of actuarial data or statistical data on which the act of discrimination was based and in the Committee's view that power is sufficient.

Any questions regarding this letter can be directed to Gabrielle Lea, Policy Lawyer for the Employment Law Committee by email to gabrielle.lea@lawsociety.com.au or on 9926 0375.

Yours sincerely



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President