



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JD:gl:employment:625375
Direct line: 9926 0375

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Ms Margery Nicholl
A/G Secretary General
Law Council of Australia
DX 5719 CANBERRA

By Email: catherine.emami@lawcouncil.asn.au

Dear Ms Nicholl

ALRC Issues Paper “Grey Areas – Age Barriers to Work in Commonwealth Laws”

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

The memorandum dated 9 May 2012 notes that the Issues Paper is seeking further information on a number of matters set out at paragraph 5 (a) to (i). Those matters concern legislation and policy provisions relating to income tax, superannuation, social security, family assistance, child support, workers' compensation and migration and exemptions under the *Age Discrimination Act 2004* (Cth). The Committee's comments however, relate solely to the matters at paragraph 5(f) pertaining to employment, namely:

“(f) Employment, 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 question 37 of the Issues Paper:

“**Question 37:** In practice, how effective are the general protection 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?”

The general protection provisions are set out in Part 3-1 of the *Fair Work Act 2009* (*Fair Work Act*) and section 351 within Division 5 of that Part, and proscribe adverse action taken for specified discriminatory reasons against an employee or prospective employee: section 351(1).

That provision does not apply, pursuant to section 351(2)(a), to action that is "not unlawful under any anti-discrimination law in force in the place where the action is taken" and section 351(3) lists the Commonwealth and State anti-discrimination statutes which are anti-discrimination laws for this purpose.

The Committee makes two general comments about this provision: first, the provision in section 351(2) limits the operation of section 351(1) in that the scope of the general protection remedies is confined to those actions which are unlawful in the place where the action is taken. In deciding whether an action might be brought, a person would need to consider the applicable State anti-discrimination law and also Commonwealth law, which could be a complex preliminary question.

Secondly, the general protection provisions apply to the employees of "national system employers" defined in section 14 and extended by section 30D. Part 6-4 of the *Fair Work Act* contains provisions giving effect to certain international agreements relating to discrimination and the termination of employment. In Part 6-4 "employer" and "employee" have their ordinary meanings: section 770. Pursuant to section 772(1) employers must not terminate an employee's employment for specified reasons including at paragraph (f) discriminatory reasons. These discriminatory reasons are identical to those listed in section 351(1), however, the remedy in section 772 is available to employees for termination only. The result is a difference in the remedies available to employees according to whether or not their employer is a national system employer.

It is difficult to assess the effectiveness of the general protection provisions in addressing discrimination of the mature age employee or prospective employee, in the absence of information as to the number of matters brought and the outcomes. Since age discrimination encompasses all ages, information pertaining to those employees over 45 would need to be identified separately from other claims of age discrimination. At present this information is not available from public sources.

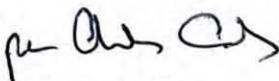
The Committee also comments on the issues raised in Question 35:

"Question 35: Should s.65 of the *Fair Work Act 2009* (Cth) be amended to include age as a basis upon which an employee may request flexible working arrangements?"

This question clearly raises matters of policy and in discussing whether section 65 should be amended, the Committee suggests that consideration should be given to factors such as the age of the employee, the basis for the application and details of the proposed arrangements, including duration.

Any questions in relation to this matter can be directed in the first instance to Gabrielle Lea, Policy Lawyer for the Employment Law Committee on (02) 9926 0375 or by email gabrielle.lea@lawsociety.com.au.

Yours sincerely



Justin Dowd
President