



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: VK:430062

27 January 2011

Mr Bill Grant
Secretary General
Law Council of Australia
DX 5719 CANBERRA

Dear Mr Grant,

Re: Consolidation of Commonwealth Anti-Discrimination Laws

Thank you for the opportunity to provide input into the development of a Law Council submission on the proposed consolidation of Commonwealth anti-discrimination laws.

The Elder Law & Succession Committee and the Human Rights Committee (the "Committees") of the Law Society of NSW have considered your memorandum dated 22 November 2010 to Constituent Body CEOs on the proposed consolidation of Commonwealth anti-discrimination laws. The Committees generally support the position set out in your memorandum and make additional comments as set out below. The Committees note also that these views are preliminary and may wish to make further comment once exposure draft legislation becomes available. The Employment Law Committee has also considered the memorandum, but will reserve its comments until the exposure draft legislation is available.

1. Level of protection

The Human Rights Committee notes that in any revision of the federal anti-discrimination statutes, there is a risk that the process may become more focused on reducing the regulatory burden on business rather than on promoting equality by guaranteeing effective protection against discrimination. The Human Rights Committee notes also that depending on how legislation is drafted, even if regulation against undesirable behaviour is increased, the "red tape" to which business is subject will not necessarily suffer a corresponding increase. The Human Rights Committee's view is that the consolidation project should be seen as an opportunity to maintain, or where necessary, strengthen the level of protection against discrimination offered by federal anti-discrimination legislation. This would enhance Australia's domestic and international reputation on human rights.

Crucially, any process of consolidation of anti-discrimination laws should not reduce the level of protection in any area. For example, the *Racial Discrimination Act 1975* (Cth) ('RDA') currently has a very wide level of protection under sections 9 and 10 in respect of the areas covered and a small number of exemptions. It also allows for the invalidation of some laws. This level of protection should not be reduced by making its form resemble less comprehensive statutes such as the *Sex Discrimination Act 1984* (Cth) ('SDA').

Rather, less comprehensive statutes like the SDA should have their form changed to resemble the RDA, reducing exemptions, increasing areas covered and adding a capacity for the invalidation of laws (especially state laws).

The *Age Discrimination Act 2004* is another good example of an area where the consolidation project should result in stronger protection against discriminatory practices. The *Age Discrimination Act* is the weakest of all the anti-discrimination legislation; containing the broadest exemptions. A paper provided by the Australian Human Rights Commission (AHRC) notes the view that: "The breadth and range of the exemptions provided in the [Age Discrimination] Act are also problematic, and potentially undermine the object of the Act to promote attitudinal change and eliminate age discrimination."¹

2. Substantive equality

The Human Rights Committee's view is that the current approach taken by Australian anti-discrimination legislation emphasises the formal rather than the substantive. Results can be reached where there is equality achieved in form, but in reality inequality persists. The Human Rights Committee supports the position that the consolidated anti-discrimination regime should provide for requiring equality in fact and not merely in legal form.

Possible mechanisms for achieving greater substantive equality include shifting the onus of proof and imposing a positive duty to promote equality.

One example of the first mechanism can be found in the position in the United States of America (US) and the United Kingdom (UK). There, if a complainant is able to establish a *prima facie* case, then the onus of proof is shifted to the defendant, requiring the defendant to prove that they did not discriminate. In Australia the onus is on the complainant alone to establish his or her case. The Human Rights Committee's view is that the onus in a consolidated anti-discrimination statute in Australia should be amended to reflect the position taken in the US and the UK. The Human Rights Committee notes also that it is the view of the Discrimination Law Experts' Roundtable in its Report on Recommendations that the "burden of proving that an action is justified and not unlawful should rest with the respondent."²

An example of the second mechanism can be found in section 75 of the *Northern Ireland Act 1998* (UK), which contains a positive duty on all public servants to promote equality in all of the duties that they carry out. The effect has been to make equality law in Northern Ireland proactive and not dependent on complaints being made. This section reflects modern thought at the United Nations and European Union on discrimination. In the Human Rights Committee's view, a similar section should be included in all federal discrimination statutes in Australia.

3. Systemic discrimination

The Committees also support the Law Council of Australia's position set out in its submission on the *Sex and Age Discrimination Amendment Bill 2010* that the powers of the Age Discrimination Commissioner should be expanded to deal with systemic discrimination. The Committees' view is that a consolidated anti-discrimination regime should contain mechanisms to address systemic discrimination, regardless of the protected attribute in question.

Age discrimination is an area that would particularly benefit from this approach. The Elder Law & Succession Committee notes the AHRC's position that "Addressing forms of

¹ Joanna Hemingway, *The Age Discrimination Act 2004* available from the Human Rights Commission website available online at: http://www.humanrights.gov.au/age/roadmap_ADA.html (last accessed 21 December 2010).

² Discrimination Law Experts' Roundtable: Report on Recommendations, 29 November 2010 at p. 8 available online at: <http://sydney.edu.au/law/about/staff/BelindaSmith/DiscrimExpertsRoundtableReport.pdf> (last accessed 27 January 2011).

systemic discrimination is seen by many as crucial to achieving real age equality or *substantive age equality*.³ The age-based stereotyping and ageist attitudes that underlie age discrimination are often socially entrenched. This is a pernicious issue that the AHRC has found can result in adverse outcomes on an individual's social, psychological and economic⁴ well-being. Age discrimination in the workplace can have broader adverse effects on national productivity.⁵ Mature age workers who are willing to work but who are unable to work could be contributing to the national economy. However, as revealed in AHRC consultations, where mature age workers want to work but cannot because of age-related discrimination, instead of contributing to the economy, mature age workers may instead be forced to rely on social welfare.⁶

Even if the complaints-based system is to be solely relied upon to achieve the policy goal of ending unlawful discrimination; the Committees' view is that the legislation should be empowered as far as possible to do so.

4. Issues particular to age-related discrimination

As Australia's population ages, the issue of age-related discrimination is one that will become increasingly pertinent. At this early stage of the consolidation project, the Elder Law & Succession Committee raises the following age-related discrimination issues for consideration:

- The Elder Law & Succession Committee agrees with the AHRC's view that there should be a general review carried out of legislation and other government policy to determine if there are age discriminatory provisions embedded, such as age caps for access to work cover insurance, which may act as a disincentive for mature workers/employers;⁷
- The Elder Law & Succession Committee's view is that access issues will become increasingly important as the Australian population ages. Consequently the Committee's view is that the consolidated anti-discrimination regime should require "reasonable adjustments", similar to those defined in section 4 and set out in section 5(2) of the *Disability Discrimination Act 1992*, regardless of the protected attribute in question.
- There may be scope within the anti-discrimination legislation to address the issue of dignity in age care facilities⁸ as it relates to ageism and age-related stereotypes.

³ Australian Human Rights Commission, *Age Discrimination – exposing the hidden barrier for mature age workers*, October 2010 (referred to as the "AHRC Report") at p.6 available online at: <http://www.hreoc.gov.au/age/hiddenbarrier/index.html> (last accessed on 21 December 2010)

⁴ In the AHRC Report, the AHRC state that the workforce participation rate for mature age workers in Australia (82.9% for 45-54 year olds, 58.9% for 55-64 year olds) is lower than for our counterparts in other key OECD countries, including Canada (85.7% for 45-54 year olds, 60.8% for 55-64 year olds), New Zealand (86.5% for 45-54 year olds, 73.2% for 55-64 year olds) and the United Kingdom (84.7% for 45-54 year olds, 59.9% for 55-64 year olds).

⁵ AHRC Report, note 3 at p.16

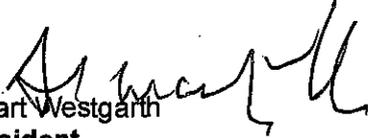
⁶ AHRC Report, note 5.

⁷ Australian Human Rights Commission, *Pod Rights Transcript Episode 19*, available online at: http://www.humanrights.gov.au/podcasts/podrights_transcripts/transcript_19_2010.html (last accessed 20 January 2011).

⁸ See Bergin, P, "A Question of Dignity" *Wills & Estates Accredited Specialists Annual Dinner*, 8 November 2010 available online from here: [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/bergin081110.pdf/\\$file/bergin081110.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/bergin081110.pdf/$file/bergin081110.pdf) (last accessed 21 January 2011)

Once again, thank you for the opportunity to comment and the Committees look forward to further collaboration on what is likely to be a long term project.

Yours sincerely,


Stuart Westgarth
President