

**INQUIRY INTO EMPLOYMENT DISCRIMINATION
AGAINST OLDER AUSTRALIANS AND
AUSTRALIANS WITH A DISABILITY**

**Legal Aid NSW Submission to the
Australian Human Rights Commission**

January 2016

Table of Contents

About Legal Aid NSW	3
Question 5 Part 1: How adequately do existing laws protect older Australians and Australians with a disability from employment discrimination?	4
Workers with a disability	4
Older workers	6
Question 5 Part 2: How effective are the legal remedies for older workers and Australians with a disability who have experienced discrimination?	6
Question 5 Part 3: How could existing laws be amended or supplemented?	7
Question 7: What are the distinct challenges faced by certain groups of older Australians and people with a disability (e.g. women, Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse backgrounds or LGBTI people) in relation to employment discrimination?	9
Appendix 1 - Legal Aid NSW Employment Law Services.....	11

About Legal Aid NSW

Legal Aid NSW welcomes the opportunity to make a submission to the Australian Human Rights Commission's National Inquiry into Employment Discrimination against Older Australians and Australians with a Disability. The following submissions are derived from the experiences of Legal Aid staff currently working in the Civil Law Division of Legal Aid NSW.

Legal Aid NSW is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance to socially and economically disadvantaged people across NSW, from all generations, including older people and people with disabilities.

Legal Aid NSW provides information, community legal education, advice, assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 Community Legal Centres (CLCs) and 28 Women's Domestic Violence Court Advocacy Services (WDVCAS).

The Civil Law Division of Legal Aid NSW provides information, advice, assistance and representation for disadvantaged and vulnerable workers in NSW. More information on Legal Aid NSW employment law related services is set out in Appendix 1 to this submission.

Legal Aid NSW's submission to the inquiry is confined to a response to questions five and seven of the Commission's Issues Paper.

Should you require any further information or wish to discuss this submission, please contact:

- Nicholas Ashby, Solicitor, Strategic Planning and Policy, Legal Aid NSW, at Nicholas.ashby@legalaid.nsw.gov.au or by telephone on (02) 4725 4608
- Bridget Akers, Solicitor, Employment Law, Combined Civil Law Specialist Team at bridget.akers@legalaid.nsw.gov.au or by telephone on (02) 4725 4609, or
- Simon Howard, Senior Solicitor, Employment Law, Combined Civil Law Specialist Team at simon.howard@legalaid.nsw.gov.au or by telephone on (02) 9219 5141.

Question 5 Part 1: How adequately do existing laws protect older Australians and Australians with a disability from employment discrimination?

Legal Aid NSW considers that the existing laws do not adequately protect older Australians and Australians with a disability from employment discrimination.

Despite the existence of beneficial laws, disability and age discrimination remain a significant problem in Australian workplaces. Legal Aid NSW advises large numbers of workers with disabilities. In particular, we advise many workers who have been injured at work and workers with unseen and/or episodic disabilities. It is our experience that these workers face particular difficulties in obtaining and retaining employment.

Workers with a disability

Workers who disclose a current or resolved workplace injury are often not employed because of their current or past disability. Employers sometimes consider employees who have had an injury in the past to be at higher risk of re-injury regardless of the circumstances of the first injury. Furthermore, it is our experience that some employers also consider a worker to have displayed bad faith by making a workers compensation claim regardless of the legitimacy of the claim. It is possible that these employees are not employed because the employer perceives a propensity to make workers compensation claims that will impact on the employer's insurance premium.

In the experience of Legal Aid NSW, employers are sometimes unaware of the obligation to comply with both discrimination laws and other workplace laws. For example, employers are sometimes unaware that a failure to provide light duties may not only be a breach of workers compensation laws but can amount to a failure to provide reasonable adjustment under the *Disability Discrimination Act 1992* (Cth) (DDA).

Case Study

Joe was a forklift driver in his mid-50s working at a medium sized logistics company. He sustained a back injury in the workplace. He made a workers compensation claim which was accepted. Joe took sick leave. After two weeks, Joe was fit to return to work on light duties. Joe worked on light duties for a few weeks. His employer then said it was unable to continue to provide light duties to Joe and stood him down without pay.

Relying on section 248 of *Workers Compensation Act 1987*, 6 months from the date of his stand down, Joe's employer terminated his employment, despite a prognosis from Joe's doctor that in time, Joe would be fit to perform his pre injury duties.

While workers compensation law and section 352 of the *Fair Work Act 2009* (Cth) (FW Act) allow an employer to lawfully dismiss an employee who has been absent from work for three¹ or six months, such a dismissal may contravene other provisions of the FW Act and discrimination laws.

¹ An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulation (section 352 *Fair Work Act 2009* Cth). An illness is not a temporary illness if the employee's absence extends for more than six months or if the total absences of an employee, within a 12 month period, have been more than 3 months Regulation 3.01(5) *Fair Work Regulations*.

Case study

John worked as a delivery driver for a large company. John was diagnosed with cancer and took three and a half months off work to obtain treatment. After completing his treatment he provided his employer with a letter from his doctor stating that John required a graduated return to work over the next two months. John's employer terminated his employment because he had been absent from work for three months.

Workers with unseen and/or episodic disabilities often experience discrimination in the provision of reasonable adjustment. Where a disability is unseen, in our experience, some employers doubt that employees really have a disability and consider that they are malingering or 'playing the system' for better employment conditions.

Case study

Susie was a human resources manager in her late 30s at a large mining company. Susie has bi-polar disorder. Susie's condition was well managed and she had remained in employment her entire adult life. Susie disclosed her disability to some of her colleagues and her immediate supervisor shortly after she started work.

After completing a year of service, Susie had a depressive episode where she was unable to go to work. Susie was unable to communicate with her employer during this depressive episode. Despite knowing about Susie's disability, when Susie didn't contact her employer, Susie's employer considered that she had abandoned her employment and dismissed her.

The termination of her employment made Susie's depressive episode worse and she was unable to get legal advice about her situation for some months. This left her out of time to lodge an unfair dismissal application or a general protections application.

Susie did not want to complain to either the Australian Human Rights Commission or the NSW Anti-Discrimination Board as she knew that the process would take some time. She was not interested in compensation but reinstatement which, given the delay, would have been an unlikely outcome.

Case study

Jane has multiple sclerosis and obtained employment as an Accounts Payable clerk with a truck company. When Jane was offered the job, her supervisor told her that her hours of work would be 8.00am to 4.00pm with a one hour lunch break. Because of her disability, Jane finds it hard to get moving in the morning. Jane disclosed her disability to her supervisor and asked if she could start work at 9.00am and work to 5.00pm or work through her lunch break. Jane's supervisor said that she could not start work at 9.00am because everyone else at the company starts at 8.00am and the Accounts Payable Clerk has always started at 8.00am.

After about a year of employment, Jane had a period when she was unwell. Jane asked her employer if she could work four days per week whilst she was unwell. Jane's employer asked her how long she would need to work for four days per week. Jane said that she didn't know but that she expected to be able to resume full time work. Jane's employer said that it needed certainty in its employee's working arrangements. Jane's employer said that she could either sign a new contract which provided that she works for four days per week or she could become a casual employee. Whilst Jane only wanted to work four days per week for a short time, she agreed to sign the new contract because she did not wish to be made casual and lose access to sick leave.

Where a disability is episodic, employers can be frustrated by the fact that employees don't have a consistent need for the same adjustment. Whilst it is reasonable that employers require some certainty that employees will attend work in regular patterns, employers need to be flexible. Employers often want work to be performed in a particular manner because it has always been done that way. In our experience, employers can be unwilling to think laterally about how a job can be performed.

Older workers

Legal Aid NSW notes that age discrimination occurs in all industries and professions and across genders. Older workers in low paid, low skilled employment and those in very senior roles equally experience age discrimination.

Furthermore, in some industries, age discrimination occurs earlier than may be expected. For example in industries such as IT and creative industries, workers in their forties may experience age discrimination.

Case study

Bill is 60 and is an executive in an advertising agency. Bill's manager often asks him when he will retire. Bill's manager also often tells Bill that it is important that the company be 'innovative and energetic'. Bill has noticed lately that whenever the company recruits, someone in their 20s gets the job. Bill's employer recently restructured his division. As a result of the restructure, Bill has fewer employees reporting to him. Bill feels superfluous and discriminated against on the ground of his age.

Case study

Freda is 65 and has worked on a process line at a factory for 25 years. Her job involves packing biscuits. Freda is single, has no retirement savings and no family to support her. Freda's employer has recently introduced a requirement that workers are required to pack more boxes per hour. Freda thinks this new requirement is a strategy to get rid of older workers.

Question 5 Part 2: How effective are the legal remedies for older workers and Australians with a disability who have experienced discrimination?

Existing Federal and State laws dealing with anti-discrimination, including the FW Act, provide older Australians and Australians with a disability with some protection from discrimination. Workers are able to lodge complaints based on age and/or disability discrimination with the Australian Human Rights Commission (AHRC), the Anti-Discrimination Board of NSW (ADB) and the Fair Work Commission (FWC). In the experience of Legal Aid NSW, the conciliation processes of the AHRC, ADB and FWC are quick, cheap and effective in resolving claims of discrimination.

However, if a complaint is not able to be settled by conciliation, pursuing a claim of discrimination becomes much more difficult. For reasons discussed below in our recommendations, commencing legal proceedings in the Federal Court, Federal Circuit Court or NSW Civil and Administrative Tribunal can be a lengthy, expensive and complicated process.

Question 5 Part 3: How could existing laws be amended or supplemented?

Legal Aid NSW submits the following recommendations would improve protections for all people who experience discrimination, including workers with a disability and older workers.

Recommendation 1: Reverse the onus of proof for all discrimination laws

Legal Aid NSW recommends that the onus of proof should be reversed for Federal and State anti-discrimination laws. Legal Aid NSW has advised many workers with a disability and older workers who say their age or disability was a factor in them being dismissed or made redundant. However, many clients do not lodge a complaint of discrimination because of the perceived difficulty in proving their claim.

It is inappropriate to require the applicant to bear the onus of proof. In most cases, the respondent has access to a majority of the relevant evidence, documentation and knowledge surrounding the circumstances of the decision. As articulated by Professor Neil Rees:

'[t]o require the applicant to bear the burden of proof about the matter when there is undisputed evidence of an adverse outcome places the applicant in the almost impossible position of trying to prove the reasons for another person's conduct.'²

This model would see a complainant required to establish a prima facie case of discrimination before the onus of proof would shift to the respondent. The respondent would then be under an obligation to demonstrate why the decision taken did not constitute an act of discrimination.

The prospect of a reversed or shifted onus of proof is not unknown to discrimination law. Parts of the DDA already incorporate a shifted burden of proof in relation to the 'reasonableness' of a condition or requirement which has allegedly been imposed on a complainant.³ Extending this to shifting the burden of proof in the deliberation of whether discrimination has occurred is a logical and necessary extension of the law. Such reform would reflect the current UK model in discrimination matters, and has been advocated by a number of different bodies within Australia.⁴

² Rees, N, 2013 'A great opportunity for modernising our ailing discrimination laws is lost', *Human Rights Law Centre*, <Available: <http://hrlc.org.au/a-great-opportunity-for-modernising-our-ailing-discrimination-laws-is-lost/>>

³ See *Disability Discrimination Act 1992* (Cth) ss. 6(4), 11(2)

⁴ See for example, Australian Human Rights Commission, Submission No. 9 to Senate Legal and Constitutional Affairs Committee, *Exposure draft Human Rights and Anti-Discrimination Bill 2012*, December 2012, 5; Legal Aid NSW, Submission No. 134 to Australian Law Reform Commission, *Traditional Rights and Freedoms Encroachments by Commonwealth Laws – ALRC Report 124*, October 2015, 4

A reversed onus applies to the general protections provisions of the FW Act.⁵ Accordingly, it would harmonize the anti-discrimination protections in federal law if a reversed onus was inserted into federal discrimination law.

Recommendation 2: Define the term ‘reasonable adjustments’ in the *Disability Discrimination Act 1992 (Cth)*

Under the DDA a person unlawfully discriminates against a person with a disability where they fail to make reasonable adjustments, with the effect that the person with a disability is unfavourably treated or disadvantaged as a result.⁶

However, the DDA does not define the term ‘reasonable adjustments’. The Minister is empowered to make disability standards in areas of public life including employment.⁷ The *Disability Standards for Education 2005* include a framework through which the reasonableness of an adjustment may be assessed.⁸ Unfortunately, no equivalent standards exist relating to discrimination in an employment context, leaving employers and people with disabilities uncertain as to the nature of the obligations imposed in statute.

Legal Aid NSW submits that the Australian Government should give consideration to the development of non-exhaustive employment standards. Similar to the manner in which ‘family violence’ is defined in section 4B of the *Family Law Act 1975 (Cth)*, employment standards could provide a non-exhaustive list of measures that may constitute a reasonable adjustment.

Further, Legal Aid NSW recommends the introduction of an equivalent ‘reasonable adjustments’ obligation for all other protected attributes, including age. Indirect discrimination already includes an implied duty to make reasonable adjustment.⁹ The creation of an explicit statutory duty to this effect would affirm, strengthen and clarify this obligation. Again, such a development must be accompanied by clear guidance and definition of what constitutes ‘reasonable adjustments’ in order to remove any uncertainty or confusion.

Recommendation 3: Introduce an enforcement mechanism regarding right to request flexible work arrangements under the *Fair Work Act 2009 (Cth)*

Under the National Employment Standards (NES) found in the FW Act, workers who have been employed for at least 12 months and who are aged 55 or older and/or who have a disability may request flexible working arrangements.¹⁰ Employers may refuse a request for flexible working arrangements only on ‘reasonable business grounds.’¹¹

However, unlike the majority of other rights conferred by the NES, a court cannot make an order in relation to a refusal to provide flexible working conditions.¹² Legal Aid NSW considers that the FW Act should be amended to treat requests for flexible working conditions in the same way as the other provisions of the NES.

⁵ *Fair Work Act 2009 (Cth)* s361.

⁶ *Disability Discrimination Act 1992 (Cth)* s5(2), s6(2)

⁷ *Ibid* s31

⁸ *Disability Standards for Education*, Standard 3.4

⁹ Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, [38].

¹⁰ *Fair Work Act 2009 (Cth)* s65(1), s65(1A)

¹¹ *Ibid*, s65(5), s65(5A)

¹² *Ibid*, s44(2)

Recommendation 4: Strengthen the General Protections provisions in the *Fair Work Act 2009* (Cth)

The General Protections provisions in the FW Act are an important feature of the legislative protections against discrimination for workers. Legal Aid NSW is generally supportive of the General Protections provisions. However, we consider that the protections would be strengthened by legislative amendment to clarify that the breadth of the protection against discrimination in the FW Act is co-extensive with that which applies under federal discrimination law.¹³

Recommendation 5: Strengthen the protections against redundancy for older workers

Employees who are made redundant and who are employed by an organisation of fifteen or more employees are entitled to redundancy pay.¹⁴ Pursuant to section 119(2) of the FW Act, the amount payable to an employee is calculated according to his or her length of service. An employee with more than nine but less than ten years' service is entitled to sixteen weeks' redundancy pay. Redundancy payments are capped at twelve weeks' pay for individuals employed for over ten years or more.

Older employees have often been employed for longer than younger employees. Many of our clients are of the view they were selected for redundancy because of their age. Legal Aid NSW submits that as a disincentive to terminating the employment of long standing, older, employees, consideration should be given to amending the FW Act to increase the redundancy payment amounts due to this class of employee. Alternatively, we submit that provisions concerning redundancy payments should be consistent with payments in lieu of notice of termination of employment¹⁵ and workers over 45 years old should be paid a greater amount than younger workers.

Question 7: What are the distinct challenges faced by certain groups of older Australians and people with a disability (e.g. women, Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse backgrounds or LGBTI people) in relation to employment discrimination?

People with multiple attributes protected by discrimination law sometimes experience discrimination for more than one reason. This overlap is commonly referred to as 'intersectionality,' and is well documented as a cause of further disadvantage or reduced employment opportunities. For example, women with disabilities are engaged in full-time employment at a significantly lower rate than men with disabilities.¹⁶

¹³ Legal Aid NSW made extensive submissions on potential amendments to the General Protections provisions of the Fair Work Act in its submission to the Productivity Commission's Review of Workplace relations. The submission can be found on the Legal Aid NSW website at <http://www.legalaid.nsw.gov.au/what-we-do/law-reform>.

¹⁴ See *Fair Work Act 2009* (Cth) Part 2-2 Division 11, Subdivision B.

¹⁵ See s117 *Fair Work Act 2009* (Cth)

¹⁶ CPRD Civil Society Report Project Group, 2012, 'Disability Rights Now', *Civil Society Report to the Committee on the Rights of People with a Disability*, 189

The issue of intersectionality extends beyond gender. People with disabilities or older Australians who are culturally and linguistically diverse, Aboriginal or Torres Strait Islander and/or LGBTI (lesbian gay bisexual trans or intersex) may experience discrimination based on multiple aspects of their identity.

Under Federal discrimination laws, if an act is done for two or more reasons, and one of the reasons is because of a protected attribute, then the act is presumed to have been done because of the protected attribute.¹⁷

Legal Aid NSW submits that discrimination laws do not need to be specifically amended to address 'intersectional' discrimination. Under the existing law, an individual who has been discriminated against on the grounds of race and disability, for example, can lodge a complaint of both race and disability discrimination.¹⁸ Complaints may be handled by the AHRC or ADB and by the Federal Court, Federal Circuit Court or NSW Civil and Administrative Tribunal as one complaint disclosing two allegations of discrimination. Where the court finds that discrimination has occurred on two grounds, it awards separate compensation for each breach of the law.¹⁹

¹⁷ *Age Discrimination Act 2004* (Cth) s16; *Disability Discrimination Act 1992* (Cth) s10; *Sex Discrimination Act 1984* (Cth) s8; *Racial Discrimination Act 1985* (Cth) s18

¹⁸ See, for example, *Trindall v NSW Commissioner for Police* [2005] FMCA 2 in which racial and disability discrimination were both alleged and considered, but only disability discrimination was successfully established.

¹⁹ See, for example, *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767

Appendix 1 - Legal Aid NSW Employment Law Services

Overview

Legal Aid NSW assists some of the most vulnerable workers with their employment related legal problems. Many of our clients are at risk of long term unemployment – an outcome that we aim to prevent.

We provide workers with advice, assistance and representation. The workers we help have no other way to access appropriate legal or advocacy services – we see many workers who do not belong to unions and cannot afford the fees of private solicitors. Some of the types of vulnerable workers we give ongoing assistance to and represent include:

- casual / temporary workers and labour hire workers
- workers with disabilities
- workers with very poor education and literacy
- indigenous workers
- young workers (in their teens and early 20s) and older workers (over 60)
- workers who live in regional and remote areas, where there are high levels of unemployment and relative poverty
- pregnant workers
- migrant workers, including former refugees and workers exploited on 457 work visas
- workers who have been the victim of gross unlawful exploitation.

The level of assistance and representation we provide depends on the application of our policies and guidelines.

Our services

In accordance with our policies, grants of legal aid for litigation are available for the following types of matters:

- Unfair dismissal proceedings in the Fair Work Commission.
- Unfair work contract proceedings in the Federal Court or the Federal Circuit Court. This may include review proceedings under the Independent Contractors Act 1996 (Cth).
- Recovery of unpaid entitlements in the Federal Circuit Court or the Chief Industrial Magistrates Court of NSW (which is now vested with Federal jurisdiction). (The worker must have exhausted other resolution avenues, for example made a complaint to the Fair Work Ombudsman).
- Proceedings for contravention of the General Protections found in the Fair Work Act.

Namely the:

- 'workplace rights' protection
- protection against discrimination
- 'absence for illness' protection
- 'sham contractor arrangements' protection.