

Willing to Work: National Inquiry into Employment Discrimination against Older Australians

Australian Human Rights Commission

Dated 1 February 2016

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Introduction

1. The Law Council is pleased to provide this submission to the Australian Human Rights Commission (AHRC) in response to the Issues Paper *'Employment discrimination against older Australians'* for the National Inquiry into Employment Discrimination against Older Australians (**Issues Paper**).
2. As outlined in **Attachment A**, the Law Council is the peak body for the Australian legal profession. Through the law societies and bar associations of the Australian States and Territories, plus the Large Law Firm Group Ltd (the "constituent bodies" of the Law Council), the Law Council effectively speaks on behalf of around 60,000 Australian lawyers.
3. The Law Council is grateful for contributions from the Law Institute of Victoria (the LIV), the Law Society of New South Wales (the LSNSW), and the Law Society of South Australia (the LSSA) to this submission.
4. The Law Council notes that the purpose of the Issues Paper is to examine the barriers to employment for older people and make recommendations about practices, attitudes and Commonwealth laws that should be changed and actions that should be taken to address employment discrimination.
5. This submission responds to Question 5 in the Issues Paper:

(5) How adequately do existing laws protect older Australians from employment discrimination? How effective are the legal remedies for older workers who have experienced discrimination? How could existing laws be amended or supplemented?
6. This submission refers to and draws on the following Law Council submissions made in response to similar inquiries on age discrimination:
 - Australian Law Reform Commission Inquiry into Grey Areas – Age Barriers to Work in Commonwealth Laws Discussion Paper (available [here](#));
 - Australian Law Reform Commission Inquiry into Grey Areas – Age Barriers to Work in Commonwealth Laws Issues Paper (available [here](#));
 - Attorney-General's Department's Discussion Paper on Consolidation of Anti-Discrimination Laws (available [here](#)); and
 - and a supplementary submission in response to the Attorney-General's Department's Discussion Paper on Consolidation of Anti-Discrimination Laws (available [here](#)).

General Comments

7. Australia's ageing population means that age discrimination, and the ways in which it can be addressed, are becoming increasingly important issues in Australia.

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8. The Productivity Commission's 2005 report, *Economic Implications of an Aging Australia*, found that People aged over 55 years have significantly lower labour force participation rates than younger people.¹ It found that:

*As more people move into older age groups, overall participation rates are projected to drop from around 63.5 per cent in 2003-04 to 56.3 per cent by 2044-45.*²

9. In its 2010 report on *Age Discrimination – Exposing the Hidden Barrier for Mature Age Workers*,³ the AHRC described unlawful age discrimination as “one of the foremost barriers”⁴ to workplace participation by older Australians.
10. The LIV advises that due to an ageing workforce and an expectation that employees will work longer, age discrimination needs to be addressed in recruitment and in relation to providing access to flexible working arrangements.

Law Council initiative to promote equality and diversity in the legal profession

11. In November 2012, the Law Council engaged a consulting firm, Urbis, to investigate and analyse the drivers for attrition of women from the legal profession in Australia which culminated in the [National Attrition and Re-engagement Study](#) (NARS).
12. In exploring reasons why women are leaving the legal profession at a disproportionate rate compared to male lawyers, NARS found that mature aged women, particularly those joining the profession later in their careers, felt bias against their age, which meant that it was difficult to enter the profession. This was due to employers' misconceptions that older people were less willing to work long hours, did not conform to the 'young graduate' culture and, being more independent and able to leave, were therefore not worth the investment.
13. The NARS Report also recorded differences in job satisfaction between younger and older women lawyers. Overall, women lawyers aged 34 years or younger were more likely to be satisfied than their older counterparts with:
- the stability and reliability of their income (79% compared to 67%)
 - opportunities for promotion and advancement (46% compared to 31%)
 - the relationship they had with the person they reported to (71% compared to 56%).
14. On the other hand, women lawyers aged 35 years and older were more likely than younger women lawyers to be satisfied with:

¹ Productivity Commission, *Economic Implications of an Ageing Australia* (2005), XII, <http://www.pc.gov.au/inquiries/completed/ageing/report/ageing.pdf>.

² Ibid.

³ Australian Human Rights Commission, *Age Discrimination – Exposing the Hidden Barrier for Mature Age Workers*, 2010. Available from <http://www.hreoc.gov.au/pdf/age/hiddenbarrier2010.pdf>.

⁴ Ibid., p.iii.

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- the extent to which they were respected by clients (77% compared to 69%)
 - access to flexible working arrangements (68% compared to 47%).
15. The NARS Report revealed the inter-section between gender and age for Australian women lawyers. It also revealed that the experience of women lawyers changes over time and a lawyer's age may also have bearing on equality in the workplace.
 16. The Law Council has encouraged the profession to address diversity and equality in all aspects of legal practice. Following NARS, the Law Council launched a [Diversity and Equality Charter](#) (the **Charter**). The Charter is a statement of principles to acknowledge publicly a commitment to diversity and equality by the Australian legal profession. It is based on the principles of justice, integrity, equity and the pursuit of excellence upon which this profession is founded.
 17. The Charter was unanimously adopted by legal profession leaders at the Law Council of Australia's [National Attrition and Re-engagement Study](#) Workshop in May 2015. It is a significant step for the legal profession in progressing the critical issue of diversity and equality. The Charter outlines the following principles:
 - treat all people with respect and dignity regardless of sex, sexuality, disability, age, race, ethnicity, religion, culture or other arbitrary feature.
 - create and foster equality through a supportive and understanding environment for all individuals to realise their maximum potential regardless of difference.
 - promote and support a strong and fair legal profession comprising, accommodating, encouraging and respecting a diverse range of individuals and views.
 18. The Charter is available for adoption by law societies, bar associations, law firms, chambers, individuals and other entities associated with the legal profession.

Recommendation

The Law Council recommends that the Australian Human Rights Commission recommend and encourage other professions to develop a Charter to promote diversity and equality in the workplace.

Question 5: Adequacy of existing age discrimination laws and remedies

Australian legal framework

19. In the area of employment and occupation, the relevant Commonwealth laws are:
 - *Age Discrimination Act 2004* (Cth)
 - *Australian Human Rights Commission Act 1986* (Cth) (s 31) and *Australian Human Rights Commission Regulations 1989* (Cth)– Regulation 4(a)(i)

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- *Fair Work Act 2009* (Cth)
20. The Commonwealth age discrimination laws apply to all Australian employees but the impact of age discrimination laws is of particular significance for older workers.

Challenges in proving age discrimination

21. A review of the available case law reveals that one of the challenges with the existing law is proving age discrimination. There appears to be three main impediments.
22. Firstly, discrimination may occur because an employee is or is perceived to be in a particular age group rather than just the individual's age. The negative attitudes directed to persons of a particular age group or stereotyping may imputed to a particular individual. Notwithstanding the *Age Discrimination Act* defines age by reference to age group (see s 5) the concept of discrimination based on 'age group' has not been fully considered by the courts. Under the State discrimination laws, this issue has been considered in the context of 'characteristics' attributed to age. In *Virgin Blue Airlines Pty Ltd v Hopper* [2007] QSC 75 at [200] Justice Moynihan said that the concept of age group did not require a particular cut off by reference to a chronological age, suggesting that the court may consider differential treatment between younger and older age groups. However in practical terms, proving discrimination between different age groups is problematic.
23. Secondly, proving that an employee's age or age group was a reason for the discrimination is difficult. Under the *Age Discrimination Act* the employee bears the onus of proof. The *Evidence Act 1995* (Cth) applies to claims in the federal courts. In many cases there may not be direct evidence that an employee's age was a reason for the discrimination. In many cases, proof of discrimination requires inferences to be drawn from the evidence. The employers are not required to disprove that age was a factor. The Law Council notes that under the FWA the employer bears an onus of proving that the attribute, such as age, was not a reason for adverse action. The protections afforded to employees under the *Age Discrimination Act* may be enhanced if employers had an evidentiary burden to prove that age was not a reason for discrimination.
24. Thirdly, the *Age Discrimination Act* in its present terms is ill equipped to address systemic and unconscious/implicit bias. The Law Council considers that the impact of unconscious bias is particularly significant for older workers and the existing age discriminations laws and the mode and manner of proving age discrimination makes it very difficult to establish unconscious bias as a matter of some certainty from an evidentiary point of view.⁵ The Australian courts have not been called on to address unconscious bias and from an evidentiary point of view, it may be difficult to show how unconscious bias was a reason *why* an employer engaged in discrimination because of age.
25. We note however, the recent US Supreme Court decision in *Texas Department of Housing and Community Affairs v Inclusive Communities Project Inc* 576 U.S (2015) where Justice Kennedy speaking for the majority The Supreme Court acknowledged

⁵ See APS Human Capital Matters 6, Unconscious Bias, July 2012 from the Australian Public Service Commission

that implicit biases have the potential to be just as damaging as more explicit biases. While that case was concerned with race discrimination, the same issues can arise in relation to age discrimination. The Law Council notes the Age Discrimination Commissioner's rights with respect to intervening in court proceedings. If there was an opportunity for the Commissioner to seek leave to intervene in a case that raised these types of issues, it may be of great assistance to a court in addressing concepts of unconscious bias in Australian discrimination law.

26. The Law Council notes the work of academics who have identified some of the challenges for employees seeking redress for age discrimination in employment and occupation.⁶

Complaints based system

27. The LIV advises that the 'complaints based system' under the current legislative model for anti-discrimination legislation is inadequate because it relies upon the aggrieved employee to initiate against his or her employer.
28. The LIV is concerned that there has not been a single successful claim of unlawful age discrimination under the *Age Discrimination Act*.
29. The Law Council and the LIV suggests that further investigation as to whether the system of employee complaint initiated process is failing in this area by the AHRC in conducting this inquiry may be useful.
30. The Law Council refers to the 2015 Review of the Charter of Human Rights.⁷ That review discusses useful processes for making laws effective in the 2015 Review of Victoria's Charter of Rights and Responsibilities: For example, one mechanism which has been used with privacy legislation (*Privacy and Data Protection Act 2014* (Vic))⁸ in Victoria is a compliance audit process. The Law Council suggests that similar audits could be conducted by the Australian Human Rights Commission or the Fair Work Ombudsman with respect to age discrimination legislation and the FWA.

Flexible work: enforcement mechanisms

31. The LIV proposes that flexibility of employment arrangements is important for mature age people to extend their working lives or to increase the employment participation of older Australians who face other barriers. The LIV advises that the current system lacks clarity on when an employer can refuse a request for flexible work.

⁶See Burdon, Mark; Harpur, Paul --- "Re-conceptualising Privacy and Discrimination in an Age of Talent Analytics" (2014) 37(2) *University of New South Wales Law Journal* 679; ; Lacey, Wendy --- "Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia" (2014) 36(1) *Sydney Law Review* 99; MacDermott, Therese --- "Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation" (2011) 34(1) *University of New South Wales Law Journal* 182; and Encel Sol --- "Age Discrimination in Law and in Practice"; (2004) 3 *Elder Law Review* 13.

⁷ See <https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights>.

⁸ See recommendation 20 in Summary Report – From Commitment to Culture – 2015 Charter Review (available [here](#)).

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32. The LIV notes that s 65 of the *Fair Work Act* was amended to enable an employee who is 55 years of age or older to request flexible working arrangements. Under the *Fair Work Act* an employer can only refuse a request for flexible work on 'reasonable business grounds'.⁹ The notion of 'reasonable business grounds' has been broadly defined within the *Fair Work Act* (section 65(5A)). The explanatory memorandum to the *Fair Work Act* states that this includes the overall effect on the workplace and employer's business including the financial impact, as well as the impact on efficiency, productivity and customer service.¹⁰
 33. The LIV believes that employers should be required to be more transparent when claiming 'reasonable business grounds' for the refusal. Specifically, there should be a more comprehensive requirement on employers to justify the reasons for the refusal.
 34. Currently, the Fair Work Ombudsman (FWO) does not formally investigate an alleged contravention of s 65 of the *Fair Work Act*, except possibly where an employer has not provided a written response within 21 days. The LIV advises that in reality, even if a contravention letter or compliance notice is issued, the FWO is not able to escalate the matter further where an employer does not respond or take steps to comply with the *Fair Work Act*.¹¹
 35. The LIV proposes that, in the alternative, where a request for flexible working arrangements is rejected by an employer, there should be a right to have the decision reviewed by Fair Work Commission (FWC). The LIV considers that the FWC should also have the power to make binding orders where a request for flexible working arrangements has been denied for reasons which do not amount to reasonable business grounds.
 36. The LIV suggests that to support mature workers and employers, the FWO should develop a guide to negotiating and implementing flexible working arrangements for mature age workers, in consultation with unions, employer organisations and seniors organisations. As well as providing support, such a guide would assist in minimising disputes.
 37. In addition to the above, the LIV considers that the ADA should be amended to include a section dealing with flexible working arrangements for older workers. The LIV notes that under the *Equal Opportunity Act 2010* (VIC) (EO Act), there is a stand-alone section outside the direct/indirect definitions of discrimination which states that "an employer must not, in relation to the work arrangement of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer."¹² The LIV considers that a contravention of this section by an employer is simply a breach of the EO Act and direct or indirect discrimination is not a consideration. The LIV submits that a similar section be inserted in the *Age Discrimination Act* as a stand-alone section outside of direct and indirect discrimination e.g. *An employer must not, in relation to the "work*

⁹ Fair Work Act 2009 (Cth), s 65(5).

¹⁰ Explanatory Memorandum, Fair Work Act Bill 2008 (Cth), page 27.

¹¹ However, it can be a matter which is raised in a claim against the employer as a breach of section 44(1) of the Fair Work Act whereby an employer must not contravene a provision of the National Employment Standards. See e.g. *Poppy v Service to Youth Council Incorporated* [2014] FCA 656 and *Stanley v Service to Youth Council Incorporated* [2014] FCA 643 where a pecuniary penalty was awarded to each applicant pursuant to s 546(1) of the Fair Work Act for breach of the NES.

¹² Section 19 existing employees, section 17 person offered employment *Equal Opportunity Act 2010* (Vic)

arrangement” of an employee, unreasonably refuse to provide flexible work arrangements to accommodate a worker that is 55 years of age or older.

38. The Law Council notes that the *Age Discrimination Act* does not impose any obligation on an employer to make a reasonable adjustment to accommodate an older worker to perform his or her duties. The intersection between disability and the rights of older workers is a relevant issues for effective age discrimination laws. The Law Council is an advocate of consolidated Commonwealth anti-discrimination laws. Accordingly, the positive obligations on employers to make reasonable adjustments for employees that apply in the *Disability Discrimination Act* would be appropriate for the *Age Discrimination Act*.

Interaction between the Fair Work Act 2009 and anti-discrimination laws

39. The *Fair Work Act* provides that an employer must not take adverse action against an employee or prospective employee because of their age (or any other protected attribute, such as race, sex, disability).¹³
40. The Law Council’s submission in response to Australian Law Reform Commission Inquiry into *Grey Areas – Age Barriers to Work in Commonwealth Laws* Discussion Paper noted that an employer will not be found to have discriminated against their employee or prospective employee where the action taken is not unlawful under any anti-discrimination law in force in the jurisdiction where the action was taken.¹⁴ Thus, where action is authorised by or is not considered unlawful under relevant anti-discrimination law then that action is not unlawful under the adverse action provisions of the *Fair Work Act*.
41. The Law Council highlighted the problematic nature of this aspect of the *Fair Work Act*’s operation, in particular, the prospect of s 351 being applied inconsistently throughout Australia because of the different anti-discrimination laws currently operating in each jurisdiction, and the subsequent confusion that this may cause both complainants and respondents.
42. Similarly, LIV advises that the effectiveness of protections under the *Fair Work Act* are limited. The LIV identified general limitations, such as:
- Limited enforcement mechanisms under the *Fair Work Act*; and
 - A lack of a co-ordinated, holistic response to the problems.
43. The LSNSW notes that the *Fair Work Act* gives workplace protection but not necessarily within a human rights framework. The LSNSW’s Elder Law Committee considers that the two legislative regimes under the *Fair Work Act* and the *Age Discrimination Act 2004* (Cth) (ADA) provides employees with a choice on which jurisdiction they will bring their claim under, and therefore should be retained.
44. The LSNSW notes previous work done by the AHRC and the ALRC identified a number of areas where changes to existing laws were recommended.¹⁵

¹³ *Fair Work Act 2009* (Cth), section 351.

¹⁴ *Ibid*, s351(2)(a).

¹⁵ An example of previous ALRC work on barriers to mature workers can be found here:

<https://www.alrc.gov.au/inquiries/age-barriers-work>; An example of previous AHRC work in respect of working past 60 can be found here: <https://www.humanrights.gov.au/publications/working-past-our-60s-reforming-laws-and-policies-2012>.

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45. The LSNSW's Elder Law Committee notes that data from the AHRC suggests discrimination in employment on the basis of age is a prevalent ground of complaint. Given the aging workforce, the LSNSW's Elder Law Committee considers that education strategies for employers and employees as implemented by the AHRC should continue.

Further initiatives to address age discrimination in employment

46. The LIV considers that the eradication of age discrimination in employment will not just occur through the introduction of further legislation prohibiting discriminatory actions. The LIV notes that addressing discrimination in employment in our society will require reform to work practices and broader societal changes.
47. The LIV advises that the Commission should consider a multi-faceted approach including business and employment initiatives, education, codes of conduct and incentive schemes to break down barriers for mature workers in the workforce. The overall purpose of this approach would be to demonstrate the value of having mature workers within an organisation and to encourage their participation.
48. The LIV believes that this approach is consistent with the stated objectives of the *Age Discrimination Act* which aims to be a catalyst for attitudinal change and to:
- 'raise community awareness that people of all ages have the same fundamental rights and equality before the law, and eliminate discrimination on the basis of age as far as is possible in the areas of public life specified in the Act.'*
49. The LIV suggests that in addition to highlighting the valuable contribution of mature workers, any educative campaign should highlight the civil and criminal penalties that flow from discrimination, including discriminatory advertising and recruitment processes. There should be a clear mechanism to challenge discriminatory advertising by organisations, since these provisions do not appear to be commonly used.

Informal Aged Care

50. The LSSA notes the 1 July 2014 funding changes for aged care were implemented by the Commonwealth Government under what is known as the "Living Longer Living Better" initiative. The essential element of these changes is the increasing use of "user pays" in the funding paradigm. Income testing in relation to the provision of care (i.e. care in a residential facility) are the means by which these changes have been implemented.
51. The LSSA is concerned by the impact of cost increases of residential care. The effect is the relative incentive for an older person with care needs to remain in their own home for as long as possible. This has been supported by increased

Commonwealth support for in-home care. The practical effect, however, is that there is increased reliance on informal caring. That is care provided by family etc. to “top up” the level of funded in-home care in order to delay (or possibly avoid) the necessity for residential care.

52. The age at which informal caring by family members is typically delivered is the age which this Inquiry considers “vulnerable” to discrimination, i.e. 55-70 years. As such, the paradigm is the increased reliance on informal caring at an age at which the provision of that care brings employment vulnerability.
53. Importantly, it is not uncommon for those in the 55-70 age bracket to be faced with a scenario whereby a family member is at short notice in need of care of an extended period, if not indefinitely. Because it takes time to arrange for long term care, existing employment arrangements for the carer will be at risk. The extra hurdle the carer in the 55-70 age bracket faces in getting back into the workforce if they are required to temporarily leave their employment.
54. The LSSA therefore believes that consideration should be given to the introduction of legislation which supports informal caring in a similar manner as support is provided for maternity/paternity leave (i.e. a finite period of unpaid leave from the workplace). This would recognise the practical reality that “end of life” care has many similarities to “start of life care” and, importantly, the greater employment vulnerability for senior members of the community who are suddenly faced with the need to provide informal full-time care to family members

Conclusion

55. The Law Council thanks the AHRC for the opportunity to comment on the Issues Paper and for the extension of time in which to do so.
56. The Law Council recommends that AHRC inquire further into improvements that could be made to Commonwealth laws and legal frameworks to remove barriers to the participation of older people in the workforce by:
 - revisiting the consolidation of Commonwealth anti-discrimination laws into a single Act to improve protection for intersectional discrimination in employment;
 - inquiring into the interaction between the *Fair Work Act* and Commonwealth, State and Territory anti-discrimination laws; and
 - strengthening provisions for the flexible working arrangements under the *Fair Work Act*.
57. The Law Council hopes that this submission is of assistance to the AHRC and looks forward to providing further comments on the AHRC’s Discussion Paper on this important issue once it is released later this year.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.