

National Seniors

Australia

**Submission in Response to the Consolidation of
Commonwealth Anti-Discrimination Laws:
*Human Rights and Anti-Discrimination Bill 2012***

December 2012

About National Seniors Australia (National Seniors)

With a quarter of a million members Australia-wide, National Seniors is the consumer lobby for the over-50s. It is the fourth largest organisation of its type in the world.

We give our members a voice – we listen and represent our members' views to governments, business and the community on the issues of concern to the over 50s.

We keep our members informed – by providing news and information to our members through our Australia-wide branch network, comprehensive website, forums and meetings, bi-monthly lifestyle magazine and weekly e-newsletter.

We provide a world of opportunity – we offer members the chance to use their expertise, skills and life experience to make a difference by volunteering and making a difference to the lives of others.

We support those in need – as a not-for-profit organisation, we raise funds and redirect monies received to older Australians who are most in need.

We help our members save – we offer member rewards with discounts from over 7,000 business across Australia, we offer discount travel and tours designed for the over 50s, and we provide older Australians with affordable, quality insurance to suit their needs.

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Recommendations

1. National Seniors recommends that Clause 17 be amended to add an additional protected attribute of *carer responsibilities*. This would include those people who are carers and are not immediate family members of the individual receiving care.
2. National Seniors recommends the removal of 'conduct that offends' from the meaning of unfavourable treatment within The Bill.
3. National Seniors recommends that applications for credit be based upon actuarial data that is available and assessed upon individual circumstances, rather than age.
4. National Seniors recommends that a Compensation Matrix be developed and included within subordinate regulation.
5. National Seniors recommends and urges that Clause 56 which relates to the activities and conduct of employers and employment agencies be upheld within The Bill.
6. National Seniors recommends that The Bill allow for the complainant to be provided with additional time when allocating a time and location for a conference in relation to a complaint, in those events where an applicant has significant health concerns or a disability that impacts on their ability to meet the 14 day timeframe.
7. National Seniors recommends the direct transfer of Section 3(e) of the *Age Discrimination Act 2004* into the objectives of The Bill.

Introduction

A prosperous and cohesive society cannot afford to overlook the ability of all age groups to make contributions, both financially and socially. National Seniors understands that discrimination is widespread especially within recruitment to the workplace. Furthermore, age discrimination is a concept that cannot be ignored and greater efforts are required within the policy making process to address and overcome it.

National Seniors appreciates the opportunity to provide comments on the Draft Legislation *Human Rights and Anti-Discrimination Bill 2012* (The Bill) which consolidates the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Australian Human Rights Commission Act 1986*.

National Seniors Australia (National Seniors) is the country's largest organisation representing the interests of those aged 50 and over, with more than 200,000 individual members nationally. This broad based support enables National Seniors to provide a well informed and representative voice on behalf of its members and contribute to public education, debate and community consultation on issues of direct relevance to older Australians.

The move by the Australian Government to consolidate current Discrimination Acts into a sole, coherent Legislation is welcomed by National Seniors. Furthermore, we recognise that in doing so, discrimination claims may be dealt with in a more efficient and simple manner. The consolidation of the anti-discrimination laws will provide essential principals which will establish a baseline for the protection of human rights within Australia. National Seniors understands that The Bill will inform both individuals and industry on their rights, enhance equality and further improve the delivery of services.

With specific regard to older Australians, National Seniors believes that The Bill will decrease instances of age discrimination, reduce the prevalence of stereotypes which confine older Australians and also strengthen actions against instances and experiences of age discrimination. National Seniors believes this is especially necessary within mature age employment and entry into aged care facilities, particularly with regard to the growing and ageing Australian population.

National Seniors also supports the implementation of the standards of the *Racial Discrimination Act 1975* (RDA) as the highest anti-discrimination principles within The Bill, further protecting claimants and strengthening the basis for a complaint.

The Protected Attributes

Gender Identity and Sexual Orientation

National Seniors supports the protected attributes within The Bill and welcomes the introduction of 'Gender Identity' and 'Sexual Orientation' as additional protected attributes. National Seniors agrees with the commonwealth that discrimination on the basis of sexual orientation in aged care facilities is inappropriate.

Given that 11% of Australians may be of diverse sexual orientation¹, National Seniors believes that it is critical that the age care industry not only protects its clients from discrimination based on gender identification and sexual orientation but also amend its policies and practises to better accommodate these individuals' living preferences (for example, the ability to live with your partner within an aged care facility).

Disability and Family Responsibilities (Caring Responsibilities)

National Seniors supports the incorporation of 'disability aids' and 'carers' within the definition of disability as a protected attribute within The Bill. As a result, it will become unlawful to discriminate within employment and also within other areas of public life against a person with a disability and who requires the use of assistance aids.

National Seniors understands that this will allow for greater financial and social participation within society. National Seniors also supports the inclusion of 'Family Responsibilities' as a protected attribute within The Bill. This Clause not only provides protection from discrimination within workplace activities regarding a person's role as a carer, but also acknowledges the contributions that many older Australians make to society.

National Seniors research (2012) shows that family and carer responsibilities, disability and a person's age result in multiple obstacles to entering the workforce or in efforts to increase the quantity of hours worked.² Some key findings within our research show that 18% of older carers experience discrimination in relation to their caring responsibilities.

In addition, 13% of older workers who participated within paid employment within the last 5 years (from 2008-2012), experienced workplace exclusion specifically attributable to age.² These experiences of discrimination are a significant factor in decisions to leave the workforce. Our research (2012) shows that this will have a significant impact over time on the Australian economy,

¹ Department of Health and Ageing (2012). *National Lesbian, Gay, Bisexual, Transgender and Intersex Ageing and Aged Care Strategy*. Australian Government

² National Seniors Australia (2012) *Barriers to Mature Age Employment: Final Report of Consultative Forum on Mature Age Participation*. Productive Ageing Centre : Canberra

resulting in a loss of almost 450,000 potential employees by 2031 which translates to around 12.5 million work hours forgone.²

Furthermore, recent data released by the Australian Bureau of Statistics (ABS) states that in "2009, there were approximately 521,000 carers aged 65 years and over"³

To acknowledge the growing number of older Australians who allocate a large proportion of their time to provide care and support, *National Seniors recommends that Clause 17 be amended to include an additional protected attribute of carer responsibilities. This would extend to those people who are carers and are not immediate family members of the individual receiving care.*

In many instances, a carer provides direct support to people other than family and this support should be accounted for within The Bill.

Meaning of Discrimination

The definition of discrimination, as outlined within The Bill does not clearly stipulate or include the concept of 'offence'. Furthermore, no provision has been made within The Bill to outline situations or experiences of an offence, leaving the legislation open to doubt. National Seniors believes that the inclusion of this elusive term will result in subjective constructions of offence and consequently, the law.

To enhance certainty of law and to maintain freedom of speech within Australia, National Seniors supports statements made by Jim Spigelman within *The Australian* (Rout, 2012: 4) that the inclusion of offence within The Bill would "raise issues of subjectivity, cultural beliefs and attitudes of individuals and groups".⁴

Therefore, *National Seniors recommends the removal of 'conduct that offends' from the meaning of unfavourable treatment within The Bill.* National Seniors believes that the protected attributes, exceptions and exemptions outlined within The Bill provide transparency and accountability and that there is no reasonable need to incorporate the subjective term of offence within the legislation.

A National Seniors member states:

Is freedom of speech so dangerous that the Federal Government has to legislate against it? Being more sensitive to the feelings of others is a commendable aim, but legal enforcement of such an improvement in behaviour at the expense of curtailing freedom of speech is going too far.

³ Australian Bureau of Statistics (2012) *Australian Social Trends December 2012: Older Carers*. Australian Government. Canberra.

⁴ Milana Rout, ALP dissent curtails Roxon on free speech', *The Australian* (Sydney), 12 December 2012, 4.

Furthermore, including offence as a new provision within The Bill is inconsistent with the objectives which state that the consolidated Acts offer clearer and more efficient laws, provide greater flexibility in their operation, with no substantial change in practical outcome.

National Seniors believes that the inclusion of offence within The Bill as a factor of discrimination will alter outcomes and increase complaints being made on a subjective basis. The provision of evidence and the determination of case outcomes will prove to be significantly problematic due to the varying perceptions of concepts, truths and events by the complainant based upon individual experiences and interpretations, consequently leaving people vulnerable to the court.

A member of National Seniors provided the following comment regarding the inclusion of offence within The Bill:

An immediate problem which can be seen with the proposed legislation is that what is offensive to someone is purely subjective, making it possible for someone to claim offence from something which the speaker did not consider or believe to be offensive and leaving it open to someone to make mischievous claims for the sole purpose of creating trouble for someone they dislike...Surely if someone is going to claim to be offended by something someone says or does, they should be expected to explain in what way that behaviour was offensive and why.

To improve transparency, National Seniors believes that there is a need to review and further explain the exemptions of the protected attributes. If an exemption within The Bill is to be utilised within an area of public life, this needs to be clearly outlined. *National Seniors recommends that the Bill be amended to mandate that if a company intends to rely upon an exemption within the recruitment process they should make it clear within advertising that it is relying upon the anti-discrimination exemptions.*

It would also be appropriate to include such rationales within statements regarding travel insurance costs and quotes. Perceived discrimination in this area is a frequent concern within National Seniors' membership. Furthermore, *National Seniors recommends that applications for credit be based upon actuarial data that is available and assessed upon individual circumstances.* This approach will avoid discriminating against a person based on age as the sole factor in determining eligibility to credit and loans and will base eligibility solely on an individual's capacity to pay.

Costs and Compensation

The Bill does not outline or give guidance to a process for awarding compensation. National Seniors believes that this increases the occurrence of risk to applicants. Compensation awarded may not accurately reflect the impacts

of the experienced discrimination and the costs of making a claim. This is especially relevant to the new provision that each party bears their own costs. As there is no provision on the process of awarding compensation, this may lead to uncertainty for applicants in deciding whether to proceed with a claim and for legal representatives in selecting cases to examine on the basis of likely compensation payments. As a result, applicants may be more vulnerable to unexpected costs and consequences if their actions proceed through the courts.

National Seniors recommends that a Compensation Matrix be developed and included within subordinate regulation.

This matrix would provide guidance to all parties and allow the complainant to develop realistic expectations of the outcome of their claim. A maximum compensation limit should be included within the compensation matrix as this would deter frivolous claims being made.

Please note that the matrix should be flexible enough to consider individuals unique situations, for example the financial value of lost earnings and emotional distress.

Causing Unlawful Conduct

National Seniors supports the implementation of Clause 56 which relates to the activities and conduct of employers and employment agencies during the recruitment process.

This Clause states that; if a person who causes, instructs, induces, aids or permits another person to engage in unlawful conduct, they are also taken to have engaged within that conduct. National Seniors believes that the inclusion of this Clause is crucial as age discrimination has a significant impact on employment participation amongst older Australians. Furthermore, our research shows that discrimination experienced while job seeking is prevalent, with 36% of job seekers experiencing discrimination as a result of their age.⁵

Under this clause, conduct is the responsibility of both the employer and the employment agency to ensure advertisements and recruiting activities provide equal opportunity to job seekers of all ages (where no lawful exemptions apply to a particular position). As a result, this clause increases accountability of both the employer and the recruitment agency regarding discrimination within employment activities and provides protection from experiences of discrimination, thereby assisting older Australians to gain employment.

⁵ National Seniors Australia (2012) *Barriers to Mature Age Employment: Final Report of Consultative Forum on Mature Age Participation*. Productive Ageing Centre : Canberra

Furthermore, Australia's older population is growing with over 250,000 baby boomers turning 65 last financial year.⁶ As the population ages, the number of older Australians who will remain in the workforce and seek new employment opportunities also grows. This increase in participation results in an increased risk of age discrimination occurring.

National Seniors recommends and urges that Clause 56 be upheld within The Bill.

This Clause will not only facilitate entry into the workforce but will assist in addressing the aforementioned financial pressures of the growing and ageing population. The application of Clause 56 within The Bill will allow a greater number of older Australians to access employment, relevant to their needs, and further increase productivity among mature-age workers. Moreover, this Clause will assist older Australians who are not currently in the workforce and who are seeking work, to find new jobs.

Furthermore, National Seniors recommends the direct transfer of Section 3(e) of the *Age Discrimination Act 2004* into the objectives of The Bill. This amendment would ensure that the Bill is focused on:

- Removing barriers to older people participating in society, participation in the workforce; and
- Change negative stereotypes about older people; bearing in mind the international commitment to eliminate age discrimination reflected in the Political Declaration adopted in Madrid, Spain on 12 April 2002 by the Second World Assembly on Ageing.

Compliance

The mechanisms for compliance are a crucial element to The Bill in establishing a procedure for dealing with complaints against human rights and discrimination within Australia. National Seniors is particularly supportive of the compliance provisions as it delivers a streamlined, efficient and accountable complaints process, which is of relevance to our members.

Preparation of Complaints: Assistance from the Commission

National Seniors supports clause 96 which states that the commission must take reasonable steps to assist those people who want to make a complaint, though need support to put their complaint into writing. This is most critical for those older Australians who do not have adequate computer skills or access to the internet to make or lodge a complaint (particularly for those people who reside within remote areas).

⁶ Australian Bureau of Statistics (2012) *Media Release Happy 65th Birthday Baby Boomers*. Australian Government. Canberra

Furthermore, research by National Seniors (2011) shows that concerns about online security are major barriers to older people using the internet, trumped only by confusion and lack of knowledge and skills on how to use a computer⁷. Of those participants involved in the research, 64 per cent were deterred by concerns about security and privacy of information⁷Therefore, National Seniors believes that older Australians would greatly benefit in receiving assistance with compiling a complaint.

Commission may hold conferences

As stated within The Bill, this clause is generally consistent with the policy expressed within the *Australian Human Rights Commission Act 1986* which states that the 'commission is able to hold conferences for the purpose of conciliating a complaint' (Australian Government, 2012: 79).⁸ The Bill expresses within Clause 109 that when complainants and respondents are requested to attend a conference, both parties have 14 days from the request to allocate a time and location for the conference to be held.

National Seniors understands the requirements for efficiency within complaints, especially given the nature of some complaints. However, *National Seniors recommends that The Bill allow for flexibility of time in those events where an applicant has significant health concerns or a disability that impacts on their ability to meet the 14 day timeframe. The proposed flexibility would ensure that no older Australian is future discriminated against due to their health issue and/or disability.*

⁷ National Seniors Australia (2011). *Older Australians and the Internet: Bridging the Digital Divide*, Productive Ageing Centre: Canberr

⁸ Attorney-General's Department (2012) *Human Rights and Anti-Discrimintaion Bill 2012 Explanatory Notes* page 79, Australian Government.

Conclusion

National Seniors welcomes the consolidation of the Discrimination Acts into a single anti- discrimination law. National Seniors believes that this consolidation will enable older Australians to more clearly understand their rights and obligations and ensure that seniors receive a consistent level of protection and compensation regardless of what form the discrimination may take.

National Seniors supports the majority of the proposed clauses of The Bill, however National Seniors believes that The Bill can be enhanced by:

- Transferring section 3(e) of the *Age Discrimination Act 2004* into the objectives of The Bill;
- Amending Clause 17 to add an additional protected attribute of *carer responsibilities*. *This would include those people who are carers and are not immediate family members of the individual receiving care;*
- Removing the term 'conduct that offends' from the meaning of unfavourable treatment within The Bill;
- Ensuring that applications for credit be based upon actuarial data that is available and assessed upon individual circumstances, rather than age;
- That Clause 56 which relates to the activities and conduct of employers and employment agencies be upheld;
- Developing a Compensation Matrix; and
- Providing additional time to allocate a time and location for a conference in relation to a complaint, in those events where an applicant has significant health concerns or a disability that impacts on their ability to meet the 14 day timeframe.

National Seniors appreciates the opportunity to provide comments on The Bill and looks forward to continue to work with the Government to eliminate discrimination and protect the rights of all older Australians.

References

Attorney-General's Department. 2012 *Human Rights and Anti-Discrimination Bill 2012 Explanatory Notes* page 79, Australian Government.

Australian Bureau of Statistics. 2012. *Australian Social Trends December 2012: Older Carers*. Australian Government. Canberra.

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