

The Senate

Legal and Constitutional
Legislation Committee

Provisions of the Age Discrimination Bill 2003

September 2003

Commonwealth of Australia 2003

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RECOMMENDATIONS

Recommendation 1

The Committee recommends that ‘dominant reason’ referred to in clause 16 be defined to minimise the risk of uncertainty over the scope of the term and specify who is to bear the onus of proving the reason.

Senators Bolkus, Ludwig and Greig do not support this recommendation for the reasons set out in their dissenting reports.

Recommendation 2

The Committee recommends that the Government consider whether the lack of an exemption for acts in direct compliance with agreements made under State law is appropriate.

Senators Bolkus, Ludwig and Greig do not support this recommendation for the reasons set out in their dissenting reports.

Recommendation 3

The Committee recommends that clause 15 (indirect discrimination) be amended to include a provision, similar to sub-section 7B(2) of the *Sex Discrimination Act 1984*, specifying factors to be taken into account when considering whether a condition, requirement or practice is reasonable in the circumstances.

Recommendation 4

The Committee recommends that, in view of the increased responsibilities and expectations of HREOC, the Government further consider whether HREOC requires additional funding to fulfil these responsibilities and expectations.

Senators Bolkus and Ludwig do not support this recommendation for the reasons set out in their dissenting report.

Recommendation 5

The Committee recommends that a new provision be inserted to extend discrimination on the basis of the age of an aggrieved person’s relative or associate.

ABBREVIATIONS

ACCI	Australian Chamber of Commerce and Industry
ACOSS	Australian Council of Social Services
AIRC	Australian Industrial Relations Commission
ALHR	Australian Lawyers for Human Rights
COTA	Council on the Ageing National Seniors Partnership
HREOC	Human Rights and Equal Opportunity Commission

CHAPTER ONE

INTRODUCTION

Background

1.1 On 26 June 2003, the Attorney-General, the Hon. Darryl Williams AC QC MP, introduced the Age Discrimination Bill 2003 (the bill) into the House of Representatives. The second reading debate in the House of Representatives on the bill was adjourned on that day.

Purpose of the bill

1.2 The bill proposes to prohibit age discrimination. In his second reading speech, the Attorney-General stated that the work of the Core Consultative Group on Age Discrimination Reforms was the blueprint for the bill. He also stated that the bill is consistent with existing Commonwealth anti-discrimination laws and all state and territory anti-discrimination laws.

Reference of the bill

1.3 On 13 August 2003 and on the Selection of Bills Committee's recommendation¹, the Senate referred the provisions of the bill to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 18 September 2003. The Selection of Bills Committee noted the following issues for consideration:

- the prohibition of age discrimination in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information;
- the inclusion of a range of exemptions that make allowances for legitimate distinctions based age; and
- the conferral of functions on the Human Rights and Equal Opportunity Commission concerning age discrimination including inquiring into possible infringements, policy development, education and awareness-raising.

Submissions

1.4 The Committee advertised its inquiry in *The Australian* newspaper on 18 August 2003. It also wrote to over 75 individuals and organisations, including the Attorney-General's Department, who were identified as possibly being interested in

1 Selection of Bills Committee Report No. 8 of 2003.

the bill. They were alerted to the inquiry and invited to make a submission. A list of the parties from whom submissions were received appears at Appendix 1.

Hearing and evidence

1.5 The Committee held one public hearing on this inquiry in Parliament House, Canberra on 9 September 2003. Witnesses who appeared before the Committee at that hearing are listed in Appendix 2.

1.6 Copies of the Hansard transcript are tabled for the information of the Senate. They are also available through the Internet at <http://aph.gov.au/hansard>.

Acknowledgment

1.7 The Committee is grateful to, and wishes to thank, all those who assisted with its inquiry.

Note on references

1.8 References in this report are to individual submissions as received by the Committee, not a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER TWO

BACKGROUND TO THE BILL

Development of the bill

2.1 The Explanatory Memorandum notes that the Government identified legislation prohibiting age discrimination as a priority.¹ Age discrimination is a problem for younger and older Australians and the broader community. It has been prohibited in all States and Territories for a number of years. However, a number of recent studies and reports demonstrated to the government the need for federal age discrimination legislation. Generally, these studies and reports found that age discrimination inhibited work-force participation, contributed to higher government welfare spending and diminished the psychological well-being of affected individuals.²

2.2 In mid-2002, the Attorney-General established the Core Consultative Group, a group of key stakeholders representing a range of business and community interests, to assist the Government in developing a detailed proposal for legislation to prohibit age discrimination.³ The Government then consulted with the States, Territories, public and other Commonwealth government departments before the bill was finalised.

Options in dealing with age discrimination

2.3 The Explanatory Memorandum discussed three options to tackle age discrimination: retain the status quo; introduce self-regulation; and introduce Commonwealth age discrimination legislation. The Government recommended the latter option on the basis that the legislation would ‘have broad positive effects on the economy and on the achievement of social policy objectives’.⁴ The Explanatory Memorandum stated that costs to the government and business would be minimised by the liability exemptions and by the bill’s provisions which were adapted to the needs of business and broadly consistent with State and Territory laws.⁵

1 Explanatory Memorandum, p. 2, in noting the Government’s 2001 election statement, *Better Law More Options*.

2 Explanatory Memorandum, pp. 5-10.

3 Attorney-General’s Department, Media release, *Age Discrimination Bill 2003*, 31 July 2003, (available at

<http://www.law.gov.au/www/civiljusticeHome.nsf/Web+Pages/576854788F78E237CA256B8800802574?OpenDocument>).

4 Explanatory Memorandum, p. 21.

5 Explanatory Memorandum, pp. 21-23.

The bill

2.4 In his second reading speech, the Attorney-General stated that the work of the Core Consultative Group on Age Discrimination Reforms was the blueprint for the bill. He also stated that the bill is consistent with existing Commonwealth anti-discrimination laws and state and territory anti-discrimination laws.

2.5 The main provisions of the bill:

- ensure that State and Territory age discrimination law operates concurrently with the bill (clause 12);
- make it unlawful to discriminate on the grounds of age in respect of:
 - employment and related matters;
 - education;
 - access to premises;
 - the provision of goods, services and facilities;
 - the provision of accommodation;
 - the disposal of land;
 - the administration of Commonwealth laws and programs; and
 - requests for information on which age discrimination may be based (Divisions 2 and 3 of Part 4);
- exempt from liability certain types of conduct (Division 4 of Part 4);
- provide for criminal offences for certain conduct in relation to advertisements, victimisation and the failure to disclose source material of actuarial or statistical data (Part 5); and
- empower the Human Rights and Equal Opportunity Commission (HREOC) to:
 - grant exemptions to liability in certain circumstances (Division 5); and
 - undertake general education activities, recommend action to the Minister and intervene in court proceedings with the leave of the court (Part 6).

CHAPTER THREE

ISSUES RAISED IN THE INQUIRY

Overview

3.1 This chapter deals with the issues of concern that were raised during the inquiry. These issues were:

- the dominant purpose test;
- discrimination in work;
- HREOC's functions;
- the general exemptions; and
- other issues comprising discrimination in relation to associates and relatives, harassment and overlap with sexuality discrimination.

3.2 Subject to the Australian Chamber of Commerce and Industry's opposition to the bill¹ and the issues discussed below, there was general support for the bill in the submissions the Committee received.

Dominant reason for conduct

3.3 Clause 16 provides that where a potentially discriminatory act is done for several reasons, it is taken to be done for the reason of a person's age only if it is the dominant reason for doing the act. This is a more difficult test to satisfy than those in other Commonwealth and State anti-discrimination law.²

3.4 The Explanatory Memorandum states that:

This is different from tests in the other Commonwealth anti-discrimination legislation, which provide that the act is taken to have been done for the relevant reason if that reason is one of a number of reasons.

However, in this case, the primary solution to most aspects of age discrimination is based on education and attitudinal change. In doing so, it is critical that the legislation not establish barriers to such positive

¹ *Submission 9*, p. 18.

² See *Discrimination Act 1991* (ACT) subsection 4(3), *Anti-Discrimination Act 1977* (NSW) Section 4A, *Anti-Discrimination Act* (NT), subsection 20(3), *Anti-Discrimination Act 1991* (Qld) subsection 10(4), *Anti-Discrimination Act 1998* (Tas) paragraph 14(3)(a) and subsection 15(2), *Equal Opportunity Act 1984* (SA) subsection 6(2), *Equal Opportunity Act 1995* (Vic) paragraph 8(2)(b) and subsection 9(3), *Equal Opportunity Act 1984* (WA) section 5, *Disability Discrimination Act 1992* section 10, *Sex Discrimination Act 1984* section 8 and *Racial Discrimination Act 1975* section 18.

developments, for example, by restricting employment opportunities for older Australians by imposing unnecessary costs and inflexibility on employers acting in good faith.³

3.5 Mr Peter Anderson representing the Australian Chamber of Commerce and Industry (ACCI) supported these justifications for the dominant reason test.⁴ He conceded, however, that his organisation had not considered the dominant purpose test's effect outside the workplace. Mr Anderson indicated that the dominant test would assist employers to minimise the risk of being exposed to complaints and the costs involved in defending age discrimination complaints. He explained that:

A number of reasons can be behind decisions that are made in the workplace. It would not be reasonable for a decision which has a perfectly lawful basis—an entirely genuine and commercial basis for an employer's conduct—to be subject to not just legal challenge but adverse legal findings because it could be said that some minor or incidental component of it was discriminatory....

[I]t would at least provide a basis for employers to be able to successfully defend complaints where they could establish that the overwhelming purpose for their conduct was to impose certain requirements or to undertake certain activities where those were justified and justifiable on commercial grounds.⁵

3.6 HREOC opposed the introduction of the dominant purpose test. HREOC was of the view that the dominant reason test would make it more difficult for complaints to succeed, would invite litigation on the meaning of 'dominant purpose' and may undermine the objectives of effecting educational and attitudinal changes.⁶ HREOC observed that the dominant purpose test was removed from the *Racial Discrimination Act 1975* in 1990 because of significant concerns about the practical application of the dominant reason test.⁷ Australian Lawyers for Human Rights (ALHR) also argued against the dominant purpose along similar grounds.⁸

3.7 In relation to Mr Anderson's concerns of minor or incidental reasons providing a basis for complaints, HREOC's President, the Hon. John von Doussa, pointed out that the 'substantial reason' test used in other Commonwealth anti-

3 Explanatory Memorandum, p. 43.

4 *Committee Hansard*, 9 September 2003, p. 11.

5 *Committee Hansard*, 9 September 2003, p. 9.

6 *Submission 9*, pp. 4 and 6-10.

7 *Submission 9*, pp. 4 and 8-10; see also the then President, Sir Ronald Wilson's adverse comments concerning the dominant purpose test in the *Racial Discrimination Act 1975* in *Ardeshirian v Robe River Iron Associates* (1990) EOC 92-299.

8 *Submission 8*, pp. 2-3.

discrimination law required ‘something that is not trivial or minor—a significant reason but not a dominant one’.⁹

3.8 Evidence from representatives from the Attorney-General’s Department indicated that there was no public consultation on providing a test different to other anti-discrimination law.¹⁰

Committee view

3.9 The Committee is concerned that the dominant purpose has been proposed without broad consultation. This test was removed from the Racial Discrimination Act in 1990 on the basis of its impractical application. In the Committee’s view, the proposed test’s inconsistency with other anti-discrimination law will present significant problems for the bill, particularly in achieving the aim of attitudinal change. A more stringent test than other anti-discrimination law signals to the community the lesser importance of age discrimination when compared with other prohibited discriminatory conduct.

Recommendation 1

The Committee recommends that ‘dominant reason’ referred to in clause 16 be defined to minimise the risk of uncertainty over the scope of the term and specify who is to bear the onus of proving the reason.

Senators Bolkus, Ludwig and Greig do not support this recommendation for the reasons set out in their dissenting reports.

Discrimination in work

3.10 With the exception of the ACCI, there was general support for the prohibition of age discrimination in work. However, submissions also raised concerns with specific aspects of discrimination in work. These were:

- promoting attitudinal change in the workplace;
- unpaid work;
- the youth wages exemption;
- the ‘inherent requirements of the job’ exemption;
- the workplace agreements exemption;
- indirect discrimination; and

9 *Committee Hansard*, 9 September 2003, p. 15.

10 *Committee Hansard*, 9 September 2003, p. 21.

- other issues, such as the overlap with State law, vicarious liability, occupational health and safety obligations, legislative restrictions on holding office, casual employment and advertising.

Promoting attitudinal change in the workplace

3.11 The Explanatory Memorandum states that key objective of the bill is to ‘promote attitudinal change across society’:

This attitudinal change is needed so that people are judged on their actual capacity rather than age being used as a blunt proxy for capacity.¹¹

3.12 The Attorney-General’s Department expanded on this point:

It is intended to strike a balance between the elimination of age discrimination and recognition of legitimate age requirements. In that sense, it is not so different from the state and territory arrangements.

A fundamental principle underlying the government’s policy in this area is that the best way to protect the human rights in the particular area which we are dealing with is to educate business and the community about their rights and their obligations.¹²

3.13 The ACCI opposed the bill’s prohibition of age discrimination in work:

The stated justification is that “age discrimination has increasingly become a significant problem for older Australians, as well as for children and young people.” (Regulatory Impact Statement – ROS, page 2) ... This is a broad assertion that is not made out by the material referred to in the RIS.¹³

3.14 The ACCI also believed that the proposed legislation would be counter-productive for both mature aged and youth aged groups. An employer would be less likely to employ a person who could potentially increase a risk of complaint or litigation¹⁴ and reduce the employer’s productivity¹⁵. Further, the ACCI stated that not only did it not think that a case had been made out for the anti-age discrimination scheme operating across the employment relationship, regardless of the definition of employment, but that it:

does not support the operation of these laws (and discrimination law generally) beyond the contract of employment. Relationships between

11 Explanatory Memorandum, p. 10.

12 *Committee Hansard*, 9 September 2003, p. 20.

13 *Submission 4*, p. 9.

14 *Submission 4*, p. 11.

15 *Submission 4*, p. 13.

principals and contractors are commercial relationships (contract for services) and not in the same class as employer/employee relationships.¹⁶

3.15 The Australian Nursing Federation, YWCA of Australia (YWCA), COTA National Seniors Partnership (COTA) and Australian Council of Social Services (ACOSS) supported the general prohibition of age discrimination in work.¹⁷

Committee view

3.16 The Committee considers that anti-age discrimination in the employment context is a desirable means to influence employers to focus on the abilities of individual employees rather than those generally imputed by membership of an age range.

Unpaid work

3.17 The bill will not prohibit discrimination in relation to unpaid work. The Department's 2002 information paper on the proposed legislation acknowledged that:

... some unpaid work is done to further a person's prospects for paid employment (such as work experience or internships). Some groups expressed the view that age discrimination should not be permitted in voluntary work, noting that some unpaid workers are making the transition to paid work and others seek to contribute voluntarily in order to maintain community participation.¹⁸

3.18 The ACCI supported the lack of prohibition in relation to unpaid work.¹⁹

3.19 The Australian Nursing Federation, COTA, ACOSS and the ALHR argued that the bill should apply in relation to unpaid work.²⁰ ACOSS commented that discrimination against volunteers does occur, that older Australians represented an increasing proportion of volunteers and that volunteers' contributions should be recognised in tangible ways including legal protection.²¹

3.20 Ms Ann Wentworth from COTA indicated that age discrimination against unpaid workers may be occurring because volunteer organisations may have problems securing public liability insurance because of the age of their volunteers.²² On this

16 *Submission 4*, p. 19.

17 *Submission 3*, p. 1; *Submission 5*; *Submission 6*, p. 7; *Submission 7*, p. 1.

18 Attorney-General's Department, *Information Paper – Proposals for Commonwealth Age Discrimination Legislation*, December 2002, pp. 14-15.

19 *Submission 4*, p. 19.

20 *Submission 3*, p. 1; *Submission 6*, p. 6 and attachment, p. 16; *Submission 7*, p. 4; *Submission 8*, p. 3.

21 *Submission 7*, p. 4.

22 *Committee Hansard*, 9 September 2003, p. 5.

point, the Hon. John von Doussa acknowledged that voluntary organisations are not caught by the proposed provisions but commented that:

At the end of the day the question should be: is the insurer discriminating on legitimate grounds, namely statistics and data [see the discussion on insurance below], or is it discriminating for an unjustifiable age reason? It is discrimination on account of age; it is a question of whether it is omitted under the act and therefore not unlawful.²³

Committee view

3.21 While the Committee acknowledges concerns expressed about unpaid work, it does not recommend any changes to the bill to prohibit discriminatory conduct in relation to unpaid work.

Youth wages exemption

3.22 Clause 25 exempts discriminatory conduct in relation to youth wages, which are ‘remuneration for persons who are under 21’.²⁴ The Explanatory Memorandum asserts that:

The Government considers that youth wages are necessary to protect young peoples’ competitive position in the labour market.²⁵

3.23 The ACCI strongly supported the exemption:

It is crucial that age discrimination laws do not prejudice training schemes targeted at younger or older persons.²⁶

3.24 The ACCI asserted that a 1998 Australian Industrial Relations Commission (AIRC) inquiry concluded that ‘youth wages were of substantial public benefit’. They also referred to the joint political party support of amendments to the *Workplace Relations Act 1996* that entrenched age based youth wages. Without aged based youth wages, they commented, 200,000 jobs in the retail industry would be at risk.²⁷

3.25 The Australian Nursing Federation, YWCA, ACOSS, ALHR and HREOC did not support this exemption.²⁸ This was best expressed by the YWCA:

23 *Committee Hansard*, 9 September 2003, p. 17.

24 Sub-clause 25(2).

25 Explanatory Memorandum, p. 12.

26 *Submission 4*, p. 20.

27 *Submission 4*, p. 20.

28 *Submission 3*, p. 2; *Submission 5*, pp. 3-4; *Submission 7*, p. 4; *Submission 8*, p. 3; *Submission 9*, p. 19.

The provision for youth wages only perpetuates stereotypes of young people as being inexperienced and unskilled. If the actual intention of ‘youth wages’ is to maintain market competitiveness to a section to the workforce that requires additional assistance to attain skills then it would be more appropriate to provide the exemption for employment providing access to a specified level of training for workers of all ages, rather than just young people ... Youth wages deny the reality that housing, groceries and transport are no less expensive for a young person who has left full-time education than it is for any other adult.²⁹

3.26 Ms Erica Lewis from the YWCA also commented that the AIRC inquiry noted that although the AIRC did not find a replacement for age based youth wages ‘there was not overwhelming proof that youth wages helped young people into on-going full-time employment’.³⁰

3.27 ACOSS also commented that this exemption was a breach of Australia’s obligations under the Convention on the Rights of the Child. They suggested that youth wages be replaced with a competency based wage system.³¹ In quoting its report, *Age Matters*³², HREOC stated:

Determining the acceptability or otherwise of junior rates has been difficult because of the lack of unequivocal evidence as to the effect their abolition would have on the youth labour market overall. If there is no significant detrimental effect, the differences cannot be justified. The evidence, however, is inconclusive.³³

3.28 HREOC considered the issue could be dealt with through an appropriate special measures provision. The Hon. John von Doussa added:

... this is a very complex area. Rather than have written into the act a section which gives a permanent exemption for youth wages, it would be better to have a provision that protected youth wages by reference to awards, industrial agreements or other specific Commonwealth legislation which is directed to that particular issue.³⁴

‘Inherent requirements of the job’ exemption

3.29 Clauses 18-22 and 24 provide exemptions from liability for age discrimination on the grounds that the ‘person is unable to carry out the inherent requirements’ of the

29 *Submission 5*, p. 4.

30 *Committee Hansard*, 9 September 2003, p. 3.

31 *Submission 7*, p. 2.

32 Human Rights and Equal Opportunity Commission, *Age matters, A Report on Age Discrimination*, June 2000, p. 114.

33 *Submission 9*, p. 20.

34 *Committee Hansard*, 9 September 2003, p. 14.

work because of their age. Under those clauses the person's past training, qualifications, experience, past performance and 'all other relevant factors that it is reasonable to take into account' must be taken into account when determining whether that person is unable to carry out those requirements.

3.30 The Explanatory Memorandum states:

In consultation, business raised concerns about their exposure to complaints of age discrimination if particular positions required people of a certain age or required the performance of duties that were difficult for people of some ages to perform. There would be costs for business if employers were prevented by the risk of discrimination complaints from employing people who were able to do the work actually required in a position. ... State and Territory anti-discrimination laws all include exemptions [similar to that in the bill].³⁵

3.31 The ACCI was concerned that the exemption would not cover certain aspects of employer's conduct:

The particular problem I raise ... is that subclause 18(4) of the bill seeks to create the exemption only for certain parts of the general offence of direct discrimination. There is no reason given as to why other elements of discrimination in employment should not be included in the inherent requirements exemption. It applies to certain aspects of an employer's conduct but not others.³⁶

3.32 The Australian Nursing Federation, COTA and ACOSS opposed this exemption.³⁷ ACOSS stated that:

Negative stereotypes of younger and older people inform many people's assumptions and attitudes about inherent requirements of positions which in most cases cannot be justified by resort to evidence or data. Rather than re-enforcing these assumptions by protecting the notion of inherent requirements based on age ... it would be preferable for the Bill to require them to be subject to scrutiny by the [Human Rights and Equal Opportunity] Commission.³⁸

3.33 Also, COTA and ACOSS held similar views in relation to the wording of 'other relevant factors'.³⁹

3.34 The ALHR supported the proposal but stated that it:

35 Explanatory Memorandum, p. 12.

36 *Committee Hansard*, 9 September 2003, p. 8.

37 *Submission 3*, p. 2; *Submission 6*, p. 6; *Submission 7*, p. 1.

38 *Submission 7*, p. 1.

39 *Submission 6*, p. 6; *Submission 7*, p. 1.

was more appropriately termed a defence, with the onus on the employer to show that the defence applies in the circumstances.⁴⁰

3.35 Additionally, the ALHR argued that the bill should require employers to make adjustments to the workplace or systems of work unless it would cause unjustifiable hardship and that the defence be assessed only after those adjustments have taken place.⁴¹

Committee view

3.36 While the Committee acknowledges concerns expressed about the inherent requirements exemption, it does not recommend any changes to the bill in relation to this exemption.

Workplace agreements exemption

3.37 Sub-clause 39(8) provides:

This Part does not make unlawful anything done by a person in direct compliance with any of the following:

- (a) an order or award of a court or tribunal having power to fix minimum wages;
- (b) a certified agreement (within the meaning of the Workplace Relations Act 1996);
- (c) an Australian workplace agreement (within the meaning of the Workplace Relations Act 1996).

3.38 COTA opposed the automatic exemption on the grounds that awards and workplace agreements ‘should not be assumed to be non-discriminatory’. They recommended a two year phasing period to enable a review of existing awards and agreements to ensure their compliance with the law.⁴²

3.39 The ALHR also opposed this exemption, asserting that:

To extend the exemption in this way would result in an industrial instrument permitting discriminatory conduct even where non-discriminatory conduct is an available alternative. This is clearly inconsistent with objective of anti-discrimination laws being to require compliance wherever possible.⁴³

40 *Submission 8*, p. 3.

41 *Submission 8*, pp. 3-4.

42 *Submission 6*, attachment, p. 10.

43 *Submission 8*, p. 4.

3.40 The ACCI saw this exemption as ‘fundamental’. However, it suggested amendment of the provision to remove some anomalies:

- agreements made under State law should be exempted;
- AIRC recommendations, in relation to conciliated disputes without formal orders, should also be exempted;
- replace the wording ‘in direct compliance with’ to ‘pursuant to’ as awards and agreements ‘are increasingly facilitative in character’.⁴⁴

Committee view

3.41 The Committee considers that the exemption as currently drafted is an appropriate balance between achieving attitudinal change concerning age discrimination and providing certainty to employers in the workforce. The Committee notes, however, apparent inconsistency by not incorporating agreements made under State law within the scope of the exemption.

Recommendation 2

The Committee recommends that the Government consider whether the lack of an exemption for acts in direct compliance with agreements made under State law is appropriate.

Senators Bolkus, Ludwig and Greig do not support this recommendation for the reasons set out in their dissenting reports.

Indirect discrimination

3.42 Clauses 14 and 15 define discrimination for the purpose of the bill. They define direct discrimination—generally, a person treated unfavorably on the basis of their age—and indirect discrimination—generally, imposition of a condition that has the likely effect of disadvantaging a person of the same age as the aggrieved person. In relation to indirect discrimination, sub-clause 15(2) places the onus on ‘the discriminator’ to prove that the condition is reasonable in the circumstances.

3.43 The ACCI expressed concern over the examples of discrimination used in the Explanatory Memorandum and argued for an exemption on the basis of productivity or performance grounds. They asserted that older employees could obtain evidence indicating that certain performance standards were not reasonably achievable by people of certain ages and would therefore have a prima facie case for discrimination. Additionally, they argued that placing the onus of proving that a condition was reasonable on an alleged discriminator would increase employers’ exposure to

44 *Submission 4*, pp. 21-22.

complaints and their costs.⁴⁵ Mr Anderson also expressed these concerns in evidence.⁴⁶

3.44 In addressing the ACCI's concerns about indirect discrimination, the Hon. John von Doussa stated:

the sorts of concerns that [Mr Anderson] was raising about the definition of indirect discrimination do not pay sufficient regard to the inherent requirements provisions which are built into clause 18 and follow in the employment situation. As we understand those inherent requirement provisions in this bill, they would override, as it were, both limbs of the definition of discrimination—that is, direct discrimination and indirect discrimination. So, if an inherent requirement of a job is that you can keystroke at a particular rate, you could advertise that. Because it is an inherent requirement of the job, it would not be caught as discriminatory conduct by either of the definitions.⁴⁷

3.45 The Department's information paper acknowledged employers' concerns and stated that clear guidance on the scope of indirect discrimination provisions was important. In relation to this issue it stated:

The Government notes that HREOC would have the power to issue guidelines on aspects of the legislation and that practical guide to compliance with the indirect discrimination provisions would be useful for employers.⁴⁸

3.46 HREOC supported both clauses 14 and 15. It observed that clause 15 was modeled on section 7B of the *Sex Discrimination Act 1984*. However, HREOC was of the view that clause 15 could be further improved:

[clause 15] does not contain any reference to the matters to be taken into account when determining whether a condition, requirement or practice is reasonable in the circumstances. The Commission is of the view that the inclusion of a similar provision to s7B(2) of the SDA in the Bill will not only provide important guidance for parties to a complaint, but also assist the Commission in the administration of the legislation.⁴⁹

Committee view

3.47 The Committee supports the two limbs of discrimination, direct and indirect. However, the Committee considers the uncertainty concerning a condition's

45 *Submission 4*, pp. 13-14; see also *Committee Hansard*, 9 September 2003, p. 8.

46 *Committee Hansard*, 9 September 2003, pp. 7-8.

47 *Committee Hansard*, 9 September 2003, p. 14.

48 Attorney-General's Department, *Information Paper – Proposals for Commonwealth Age Discrimination Legislation*, December 2002, p. 10.

49 *Submission 9*, p. 18.

‘reasonableness’ can be minimised by providing factors to consider in making that determination.

Recommendation 3

The Committee recommends that clause 15 (indirect discrimination) be amended to include a provision, similar to sub-section 7B(2) of the *Sex Discrimination Act 1984*, specifying factors to be taken into account when considering whether a condition, requirement or practice is reasonable in the circumstances.

Other issues

3.48 Submissions raised several other concerns with the bill:

- the overlap with State law;
- vicarious liability;
- occupational health and safety obligations;
- legislative restrictions on holding office;
- casual employment; and
- advertising.

Overlap with State law

3.49 All States and Territories have laws prohibiting age discrimination. Clause 12 generally provides that the proposed law will not limit or exclude the operation of State or territory law. It also generally requires a complainant to choose between the relevant State, Territory and Commonwealth complaint resolution processes.

3.50 The ACCI opposed the bill generally. They believed the bill to be another layer of employment regulation on top of the state regulatory structures. Mr Anderson indicated that employers would prefer a national law that substituted the various state laws and their various tests and exemptions.⁵⁰

3.51 The ACCI also argued that, without a specific exemption, conduct consistent with Federal awards or industrial agreements could be pursued under the State complaint resolution mechanism even though specifically exempted under Commonwealth law.⁵¹

Committee view

3.52 The Committee agrees that national uniformity in anti-discrimination laws is desirable and urges the Commonwealth government to work with the Standing Committee of Attorneys-General to achieve this aim.

50 *Committee Hansard*, 9 September 2003, p. 9.

51 *Submission 4*, pp. 14-15.

Vicarious liability

3.53 Clause 57 has the effect of making an employer vicariously liable for the conduct of its employees. The Explanatory Memorandum indicates that there are similar provisions in other Commonwealth anti-discrimination law.

3.54 The ACCI recognised that the bill is consistent with other anti-discrimination law provisions relating to vicarious liability. However, they expressed concern that these provisions ‘take employer liability too far’. They referred to their publication, *Modern Workplace: Modern Future 2002-2010*, which raised the issue as a ‘matter of broader policy concern’ and advocated ‘review of vicarious liability as part of broader tort reform’.⁵²

3.55 The vicarious liability provisions were supported by the Australian Nursing Federation and COTA.⁵³ The Australian Nursing Federation suggested that the bill could be amended to protect employers suing employees to recover the costs of defending complaints.⁵⁴

Committee view

3.56 The Committee considers it desirable for employers to be held liable where their employees perform discriminatory acts within the scope of their employment. As to protecting employees from an employer recovering the costs of defending a complaint, the Committee notes that the clause 51 (victimisation) makes it an offence to cause detriment to another because the other has made a complaint.

Occupational health and safety obligations

3.57 There is no specific exemption for an employer’s obligations under occupational health and safety legislation. The ACCI argued for a specific exemption in relation to complying with occupational health and safety legislation.⁵⁵

Committee view

3.58 As to legislative occupational health and safety obligations, the Committee notes that sub-clauses 39(1), (2) and (4) provide an exemption for things done in direct compliance with Commonwealth or State law.

52 *Submission 4*, p. 27.

53 *Submission 3*, p. 2; *Submission 6*, attachment p. 10.

54 *Submission 3*, p. 2.

55 *Submission 4*, p. 25.

Legislative restrictions on holding office

3.59 Mr Abraham Sher, in his private capacity, argued that legislative restrictions on age at which people may hold office should be determined on the basis of ability and not age.⁵⁶

Committee view

3.60 As to the legislative restrictions for holding office, the Committee notes that sub-clauses 39(1), (2) and (4) provide an exemption for things done in direct compliance with Commonwealth or State law.

Casual employment

3.61 Clause 5 of the bill defines ‘employment’ to include part-time, temporary employment, work under a contract for services and work as a Commonwealth, State or State instrumentality employee.

3.62 The Australian Nursing Federation raised concerns that the definition of ‘employment’ may not cover casual work.⁵⁷ The Department assured the Committee that casual employees would fall within the definition of ‘employment’. It was of the view that the definition is consistent with that in other Commonwealth anti-discrimination laws and that casual employees have been permitted to make complaints under those laws.⁵⁸

Committee view

3.63 The Committee urges the Government to ensure that casual employees receive protection under this bill by ensuring that the definition of ‘employment’ includes casual employment.

Advertising

3.64 Clause 50 generally provides for an offence of 10 penalty units where a person publishes or displays an advertisement and that advertisement reasonably indicates an intention to discriminate on the grounds of age. The clause is substantially similar to advertising prohibitions in other Commonwealth anti-discrimination law.

3.65 The ACCI argued that extent of this prohibition was too broad and better addressed through ‘sensible education rather than heavy-handed prosecution or compliance activities’.⁵⁹

56 *Submission 2.*

57 *Submission 3*, p. 1.

58 *Committee Hansard*, 9 September 2003, p. 22; *Submission 10.*

59 *Submission 4*, p. 28.

Committee view

3.66 As to offences for advertising, the Committee considers the provisions appropriate.

The Human Rights and Equal Opportunity Commission

3.67 The bill proposes various changes that directly affect HREOC. The issues raised by submissions and witnesses were:

- that no specialist commissioner will be appointed in relation to age discrimination;
- that no additional resources will be provided to HREOC; and
- that HREOC does not have the power to undertake systematic investigations.

No specialist commissioner

3.68 Part 6 and Division 4 of Part 4 of the bill proposes to confer functions on HREOC that are generally similar to functions conferred on HREOC by other Commonwealth anti-discrimination law. These are, generally, inquiring into and conciliating complaints of discrimination and input into policy development. Unlike other Commonwealth anti-discrimination law, the bill does not provide for an age discrimination commissioner. The Attorney-General stated in his second reading speech that:

Consistent with the government's proposed reforms to the commission, the bill does not provide for an age discrimination commissioner. The government strongly believes that education about human rights and responsibilities is the most effective way to build respect and tolerance for human rights.

3.69 The Australian Human Rights and Equal Opportunity Legislation Bill 2003 (the HREOC bill) currently being considered by Parliament proposes, amongst others, to abolish the positions of specialist commissioners in HREOC. This Committee's report to the Senate on the HREOC bill recommended that the HREOC bill be amended to provide that the existing Human Rights Commissioners have a designated area of responsibility.⁶⁰

3.70 The YWCA expressed disappointment that the bill would 'not be a trigger for the establishment of a specialist commissioner, a Children and Young People's Commissioner, within HROEC.'⁶¹ Ms Loh from the YWCA explained:

⁶⁰ Senate Legal and Constitutional Legislation Committee, *Report on the Provisions of the Australian Human Rights and Equal Opportunity Legislation Bill 2003*, May 2003, Recommendation 1, p. 38.

⁶¹ *Submission 5*, p. 5.

Why do you not ask a carpenter to come and do your plumbing? There are specialists. They do research in particular areas, they advocate in particular areas, they keep up with domestic debate and domestic issues—and these domestic issues and domestic debates are different in different areas. There is nothing wrong with a bit of ‘tearoom chatting’ about giving some advice, but that is very different from hearing cases of discrimination in very particular areas. For example, we would not necessarily want a man looking at issues of sex discrimination against women, because they would not necessarily understand the perspective that the parties come to and the different issues that are being looked at. The issue of children and young people is a form of discrimination, but I would say that types of discrimination are different, types of speciality are different.⁶²

3.71 The Hon. John von Doussa indicated that the non-existence of a specialist commissioner would not affect the way in which complaints were handled.⁶³

Committee view

3.72 The Committee acknowledges that there is support for the concept of specialist commissioners. However, the Committee considers that the area of age discrimination cuts across the boundaries of existing specialisation and that there is need for greater flexibility to deal with these issues without the need to appoint a new age discrimination commissioner. This view is consistent with the Committee’s recommendations in its report on the HREOC bill.⁶⁴

No additional resourcing

3.73 Both the YWCA and COTA indicated that the additional caseload and education activities by HREOC depended upon the increase in the HREOC’s funding.⁶⁵

3.74 Although unsure of the predicted increase in workload, the Hon. John von Doussa pointed to the proportion of age discrimination complaints in other jurisdictions as being 10 per cent. He indicated that HREOC’s existing complaint function would need to be expanded, including employing additional complaint officers, and that a major emphasis would need to be placed on education to stop complaints at the outset. The Hon. John von Doussa stated that he had already written

62 *Committee Hansard*, 9 September 2003, p. 4.

63 *Committee Hansard*, 9 September 2003, p. 18.

64 See Senate Legal and Constitutional Legislation Committee, *Report on the Provisions of the Australian Human Rights and Equal Opportunity Legislation Bill 2003*, May 2003, Recommendation 1, p. 38.

65 *Submission 5*, p. 5; *Submission 6*, attachment, p. 17.

to the Department seeking additional staff and money to run a 2-year concentrated campaign with a continuing education program.⁶⁶

3.75 The Department stated that the Government would consider HREOC's letter in the context of the 2004-2005 budget.⁶⁷ However, it indicated that there would be no additional funding as a result of the bill:

... the government's policy is that agencies are not provided with new resources for changes in functions that can and should be absorbed by the normal processes of adjusting priorities and workload as circumstances change. In the case of HREOC, it receives a total budget, in the government's view, to deal with the entire spread of its responsibilities and it does not have separate budgets for particular areas of discrimination. The government is confident that the commission can manage responsibility for age discrimination legislation within its existing budget.⁶⁸

Recommendation 4

The Committee recommends that, in view of the increased responsibilities and expectations of HREOC, the Government further consider whether HREOC requires additional funding to fulfil these responsibilities and expectations.

Senators Bolkus and Ludwig do not support this recommendation for the reasons set out in their dissenting report.

Systematic investigations

3.76 In its submission, ACROSS supported the Youth Action and Policy Association's recommendations in its submission on the Department's information paper that the bill allow for the lodgement and investigation of representative complaints:

... like other Commonwealth anti-discrimination legislation, the proposed age discrimination legislation is primarily directed towards an individual complaints based system. YAPA points out that young people tend not to make complaints, therefore unless particular measures are taken, this legislation is likely to operate to the advantage of older people but less so for younger people.⁶⁹

3.77 The Hon. John von Doussa stated the functions conferred by the bill will be 'mirrors of the functions which are in the HREOC Act.'⁷⁰

66 *Committee Hansard*, 9 September 2003, pp. 17-18.

67 *Submission 10*.

68 *Committee Hansard*, 9 September 2003, p. 20.

69 *Submission 7*, p. 5.

70 *Committee Hansard*, 9 September 2003, p. 15.

Committee view

3.78 The Committee received little evidence on this issue and considers it more appropriately addressed in any review of the complaint handling mechanisms under Commonwealth anti-discrimination law.

Overlap with Australian Industrial Relations Commission

3.79 The Department's information paper recognises that there is overlap between the jurisdictions of HREOC and the AIRC in relation to age discrimination complaints in the workplace.

HREOC's practice, in relation to existing anti-discrimination legislation, is to avoid any duplication of work between it and the AIRC. HREOC considers whether a matter should be terminated on the basis that it has already been dealt with by the AIRC or that the AIRC provides a more appropriate remedy.⁷¹

3.80 The ACCI recognised this approach as a product of custom and practice but commented that:

It is preferable that industrial disputes (e.g. a complaint of indirect discrimination arising from a work practice) to be dealt with ... by the AIRC rather than HREOC.⁷²

Committee view

The Committee considers that HREOC's existing practice of managing complaints which may be dealt with both by HREOC and AIRC to be appropriate.

General exemptions

3.81 Division 4 of Part 4 provides various statutory exemptions to liability for discriminatory conduct (general exemptions). In addition to these general exemptions, clause 44 empowers the Commission to grant, on application, exemptions from liability under Division 2 and 3. Under clauses 45 and 46 notices of the Commission's decision together with reasons must be published and are subject to review in the Administrative Appeals Tribunal.

3.82 COTA argued that the statutory exemptions were too broad and argued that the exemptions should either be examined over a 2-year period or the power to provide an exemption exercised on a case-by-case basis by the Commission:

We believe that the extent of the general exemptions seriously compromise the intentions of government and the objects of the Bill which seek to make

71 Attorney-General's Department, *Information Paper – Proposals for Commonwealth Age Discrimination Legislation*, December 2002, p. 18.

72 *Submission 4*, p. 23.

age discrimination unlawful, to remove barriers to participation and to change negative stereotypes about older people ... Section 39(2) provides for certain Acts or regulations to be exempt for a two-year period from the commencement of the Act. We believe that a similar provision should be added to a number of other sections of Division 4 to ensure that practice in a wide range of areas delineated in this Division are subject to review rather than given automatic exemption. In other cases we believe it more appropriate that the Commission should determine an application for exemption rather than the matter being included in legislation.⁷³

3.83 Ms Lewis from the YWCA also supported exemptions being provided on a case-by-case basis.⁷⁴

3.84 The ALHR also opposed the range of general exemptions. However, it argued that rather than providing general exemptions the Act should provide defences. Therefore the onus would be on the 'discriminator' to prove that the discriminatory conduct justified in the particular circumstances. Further, the ALHR submitted that the various general exemptions be replaced with a 'bona fide justification' defence:

such a defence would require the provider to establish that a particular requirement or condition was "inherent" to the particular context, and that to remove or modify that requirement or condition would impose unjustifiable hardship.

Such a defence exists within the Canadian legislative scheme and has resulted in a more coherent jurisprudence developing to deal with the application of the defences of "bona fide occupational requirements" (inherent requirements of the position) and "bona fide justifications" (inherent requirements in service provision and elsewhere).⁷⁵

3.85 The ALHR argued that such a defence would accommodate the existing exemptions in the bill but would help to ensure that 'compliance would be more reflective of the promotion of equality rights and the capacity of organisations to provide equal opportunity on the basis of age'.

3.86 The Department asserted that the general exemptions were designed to reflect the objects of the bill. It argued that the exemptions were developed by Government working with:

business and the community to ensure that the legislation strikes the right balance between the need to eliminate unfair discrimination on the basis of age and the need to ensure sufficient flexibility to accommodate legitimate age requirements...

73 *Submission 6*, p. 3.

74 *Committee Hansard*, 9 September 2003, p. 3.

75 *Submission 8*, pp. 4-5.

It has therefore not been necessary to estimate the cost to government or business of a different system based exclusively on specific exemptions granted by HREOC. It is fair to say, however, that the cost to both government and business of such a system would have been very considerable.⁷⁶

3.87 Concerns were also raised with specific general exemptions:

- direct compliance with the law (clause 39);
- migration law (clause 43);
- positive discrimination (clause 33);
- insurance and credit (clause 37);
- charities, voluntary and religious bodies (clauses 34, 35 and 36);
- superannuation (clauses 37 and 38);
- health (clause 42); and
- social security law (clause 41).

Direct compliance with law

3.88 Sub-clause 39(1) exempts conduct where done in direct compliance with a Commonwealth Act or other instrument mentioned in schedule 1. Sub-clause 39(2) provides for an exemption, in the first 2 years of the bill's operation, for any thing done in direct compliance with any Commonwealth Act or regulation. Sub-clauses 39(4) and (5) exempt anything done in direct compliance with State or Territory acts or their regulations.

3.89 ACOSS was of the view that most if not all laws specified in schedule 1 could be included in the 'sunset provision' of subsection 39(2).⁷⁷ COTA agreed that 'many of these provisions are unsustainable when subject to rational analysis'.⁷⁸ The ALHR also opposed sub-clause 39(1) and argued that the 'bona fide justification' defence (see paragraph 3.84) above) was an appropriate approach.⁷⁹

3.90 HREOC noted that some of the legislation included in schedule 1 did not form part of the discussion of the Core Consultative Group and Working Groups.⁸⁰ However, the Hon. John von Doussa stated that HREOC was generally supportive of the whole of clause 39.⁸¹

76 *Submission 10.*

77 *Submission 7*, p. 2.

78 *Submission 6*, p. 5.

79 *Submission 8*, p. 5.

80 *Submission 9*, p. 15.

81 *Committee Hansard*, 9 September 2003, p. 14.

3.91 The YWCA expressed concern about the exemption of the *Corporations Act 2001* under sub-clause 39(1).⁸² The YWCA acknowledged the legal complexities in involving young people in corporate governance. However, it opposed the blanket exemption of acts done in direct compliance with this Act:

Steps have been taken to remove barriers to older persons participating in the governance of corporations but this legislation suggests that there will be no further consideration will be given to support young people's participation.⁸³

3.92 HREOC opposed the application of any exemption to defence force legislation and subsidiary instruments as these provisions provided the basis for employing its members. It submitted that the defence force should be subject to the same provisions as other employers.⁸⁴ As the Hon. John von Doussa explained:

The Defence Force, it seems to us, is unlike the service providers who provide pensions, social security and the like. The Defence Force is in fact a major employer, and the age discrimination issues arise as part of the terms of employment of a very large number of people. Rather than simply excluding in a blanket way all Defence Force personnel because of provisions in defence acts, we offer the view that it is time that there is some substitutive test to make the age discrimination depend upon the suitability of the applicant for a particular job. So one looks at the merits of the person in relation to a position on a case-by-case basis to see whether there is in fact age discrimination.⁸⁵

3.93 In relation to the defence force legislation exemption under sub-clause 39(1), the Department stated that:

... the instruments made under the legislation dealing with [defence] are concerned with matters relating to the ADF [Australian Defence Force] maintaining a fit fighting force. Some very specific considerations that will often turn on age differentiation arise there. As when you look into other areas, there are very many age based considerations that are generally regarded, without much exception, as being reasonable. In this case the defence situation is particularly concerned with establishing and maintaining a fit and, inevitably, youthful fighting force.⁸⁶

3.94 The Department also indicated that there were internal Australian Defence Force processes to consider and review decisions based on age differentiation. It also

82 Item 18 of schedule 1.

83 *Submission 5*, p. 4.

84 *Submission 9*, pp. 16-17.

85 *Committee Hansard*, 9 September 2003, p. 14.

86 *Committee Hansard*, 9 September 2003, p. 27.

indicated that research is being conducted by the defence force as to the physical requirements required for different activities.⁸⁷

3.95 In relation to the exemption for State laws, HREOC did not oppose that proposal. It also welcomed sub-clause 39(5), which enables Parliament to provide exceptions to the exemption where appropriate.⁸⁸ The ALHR argued that only acts done in direct compliance with *prescribed* state and territory laws should be exempted.⁸⁹

Committee view

3.96 The Committee considers the exemptions in clause 39 an appropriate practical balance between providing protection against age discrimination and exempting circumstances in which age-based distinctions are legitimate.

Charities, voluntary and religious bodies

3.97 Clause 34 generally exempts charities from discriminating against a person in connection with conferring a charitable benefit. Clause 35 generally exempts religious bodies from discriminating against a person where the act conforms to the tenets of religious doctrine. Clause 36 generally exempts voluntary bodies from discriminating against a person in connection with the administration of a person as a member or the provision of benefits, facilities or services to members.

3.98 ACOSS expressed concern that these exemptions may extend to both a benefit, facility or service provided by these bodies on behalf of the Commonwealth and the employment of personnel to deliver these benefits, facilities or services.⁹⁰ Additionally, both ACOSS and COTA argued that there should be no general exemption to charities or voluntary bodies and that these bodies should apply to HREOC for specific exemptions.⁹¹ The ALHR did not support the exemption and argued for a ‘bona fide justification’ defence (see paragraph 3.84 above).⁹²

3.99 The Department assured the Committee that the exemption would not extend to a benefit, facility or service provided by these bodies on behalf of the Commonwealth or in relation to employment. It also pointed to clause 31:

Clause 31 of the Bill makes it unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for

87 *Committee Hansard*, 9 September 2003, p. 27.

88 *Submission 9*, p. 16.

89 *Submission 8*, p. 6.

90 *Submission 7*, p. 2.

91 *Submission 6*, p. 3; *Submission 7*, pp. 2-3.

92 *Submission 8*, p. 6.

the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person on the basis of that person's age.⁹³

Committee view

3.100 The Committee considers the exemptions in clauses 34, 35 and 36 an appropriate practical balance between providing protection against age discrimination and exempting circumstances in which age-based distinctions are acceptable.

Superannuation

3.101 Clause 38 provides an exemption for anything done in compliance with a Commonwealth Act relating to superannuation or an instrument made under such an Act.

3.102 COTA and ACOSS raised concerns in relation to the automatic exemption of superannuation legislation and requirements concerning the restrictions in making superannuation contributions, compulsory cash outs and treatment of superannuation on the basis of a person's age.⁹⁴

3.103 The Department asserted that a thorough examination of superannuation legislation was undertaken and 'took into account the many objectives of the retirement income system and the age based distinctions'.⁹⁵ It stated:

Such age-based restrictions are essential to ensure that superannuation is appropriately used for retirement purposes, and that the taxation concessions provided to superannuation are not abused.

While it is inevitable that these arrangements will not suit all individual circumstances, the Government considers that age restrictions are essential to ensure the proper operation of the superannuation system.⁹⁶

3.104 The ACCI supported this exemption. In relation to compulsory employer superannuation contributions the ACCI stated:

This age discrimination proposal must not impose any direct cost on employers; expanding the eligibility of employees for compulsory superannuation purposes through the backdoor of age discrimination legislation is not appropriate and would have adverse cost impacts on employers and entitlements.⁹⁷

93 *Submission 10.*

94 *Submission 6*, pp. 3-5; *Submission 7*, p. 3.

95 *Submission 10.*

96 *Submission 10.*

97 *Submission 4*, p. 24.

Committee view

3.105 The Committee considers the exemptions in clause 38 an appropriate practical balance between providing protection against age discrimination and exempting circumstances in which age-based distinctions are legitimate.

Health

Sub-clauses 42(2) and (3) provide:

(2) This Part does not make unlawful anything done by a person in accordance with an exempted health program.

(3) This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's age, by taking the other person's age into account in making a decision relating to health goods or services or medical goods or services, if:

(a) taking the other person's age into account in making the decision is reasonably based on evidence, and professional knowledge, about the ability of persons of the other person's age to benefit from the goods or services; and

(b) the decision is not in accordance with an exempted health program.

3.106 The ALHR observed that no other Commonwealth anti-discrimination law exempts health programs. They did not support the blanket exemption for health programs and argued that an exemption for medical service provision could be accommodated under their proposed 'bona fide justification' defence (see paragraph 3.84 above).⁹⁸

3.107 COTA expressed concern with the term 'professional knowledge' in sub-clause 42(3)(a):

Health professionals are amongst occupational groups who accept negative stereotypes of age and base decisions on these false assumptions. In addition health professionals commonly acknowledge that they use "old age" as a simplistic even though inaccurate synonym for the effects of chronic disease/disabling conditions on older people. Older people constitute an incredibly diverse segment of the population and there are surprisingly few inevitabilities about the ways old age impacts on individual's capacities for life activities; even deterioration that is highly probable in older age occurs in proximity to death rather than at any specific age. Thus we would argue that evidence about other people of the same "old" age needs to be carefully examined to ensure that age rather than some common but not universal condition is the underlying cause. For example if

98 *Submission 8*, p. 5.

many people over 80 are too frail to gain benefits from surgery to replace heart valves this is no reason to discriminate by denying such an operation to an otherwise fit and resilient person in their nineties.⁹⁹

3.108 Similarly, the YWCA commented:

We hope that this provision will relate to clinical benefits only and not become an avenue for young people being refused access to medical services because of practitioners personal views.¹⁰⁰

3.109 The Department indicated that HREOC would examine any claim of an exemption under paragraph 42(3)(a) and would likely examine the evidence for such a claim in determining whether the claim was reasonable.¹⁰¹

3.110 The YWCA also expressed disappointment that sub-clause 42(5)(a) (exemption for anything done in relation to the administration of the *Health Insurance Act 1973*) would effectively not enable the Health Insurance Commission to issue children under 15 years old their own Medicare Card.¹⁰²

Committee view

3.111 The Committee considers the exemptions in clause 42 an appropriate practical balance between providing protection against age discrimination and exempting circumstances in which age-based distinctions are acceptable.

Insurance and credit

3.112 Sub-clauses 37(1) to (3) provide an exemption in relation to types of insurance and membership to superannuation or provident funds or schemes. Sub-clauses 37(4) and 37(5) provide an exemption in relation to the provision of credit. Under these exemptions the discrimination must be based on reasonably reliable actuarial or statistical data and the discrimination is reasonable having regards to the data and other relevant factors.

3.113 In relation to insurance and membership of superannuation funds or schemes, the ALHR submitted that the exemption should be limited to the setting of premiums:

A principle of insurance is that all risks are insurable. However, it is recognised that as some risks are statistically more likely to arise depending on a person's particular characteristic[s], then the costs of insuring against that risk can be commensurate with the increased risk.¹⁰³

99 *Submission 6*, pp. 5-6.

100 *Submission 5*, p. 5.

101 *Submission 10*.

102 *Submission 5*, p. 5.

103 *Submission 8*, p. 5.

3.114 The Department argued that limiting the exemption to the pricing of insurance would result in higher costs:

That approach would require the insurance company to expend resources on setting premiums on a case by case basis. The outcome would be likely to ‘price’ the individual out of the market. It may also raise the expectations of individuals and ultimately diminish confidence in the insurance industry.¹⁰⁴

3.115 In relation to the provision of credit, both ACOSS and COTA questioned the relevance of actuarial and statistical data, with the exception of debt waiver on death or disability:

Capacity to pay rather than chronological age should determine eligibility for credit. The current practice of the credit industry is that points based assessment is made of an applicant’s ability meet the terms of credit. Exemption for age discrimination is unnecessary. Should credit providers wish to do so, they may apply to the Commissioner for an exemption in a particular case.¹⁰⁵

3.116 The ALHR did not support the exemption of credit provision and asserted that this exemption could be covered by their proposed ‘bona fide justification’ defence (see paragraph 3.84 above).¹⁰⁶

3.117 The Department asserted that statistical and actuarial data was, amongst others, predictive of a capacity to repay. It stated that data on age was only one factor to be taken into account as other data included ‘debt history, income, other debt commitments and security of employment’.¹⁰⁷ The Department also pointed to similar exemptions in State anti-discrimination laws.¹⁰⁸

Committee view

3.118 The Committee considers the exemptions in clause 37 an appropriate practical balance between providing protection against age discrimination and exempting circumstances in which age-based distinctions are acceptable.

Migration and citizenship

3.119 Clause 43 provides an exemption for:

104 *Submission 10.*

105 *Submission 6, p. 5; Submission 7, p. 3.*

106 *Submission 8, p. 5.*

107 *Submission 10.*

108 *Anti-Discrimination Act 1977 (NSW), the Equal Opportunity Act 1995 (Vic) and the Anti-Discrimination Act 1998 (Tas).*

anything done by a person in relation to the administration of the *Migration Act 1958* ... *Immigration (Guardianship of Children) Act 1946*, [and their regulations.]

3.120 The ALHR and HREOC opposed this exemption applying to more than those acts done in direct compliance with those laws. This was best expressed by HREOC:

Inclusion of discretionary acts in the exemption would be inconsistent with the general thrust of other provisions in the Bill in relation to Commonwealth laws and programs. It would have the potential to remove all action taken under the Migration Act and its regulations, that is, both those acts done in order to comply with a law and those discretionary acts done to administer the law. In any event, discretionary acts could be permitted if they met the tests set out in other exceptions, such as the proposed exception for positive discrimination.¹⁰⁹

3.121 COTA and ACROSS were of the view that these laws should merely receive a two year exemption under sub-clause 39(2).

3.122 A representative from the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) indicated that under the Migration Act and its regulations, age may not be a prescribed factor in making decisions. He provided two examples:

Let us look at the business visitor visa class. A person who applies and who is, say, 15 years of age may alert a decision maker to the question: is this person a genuine business visitor? That may be a factor the decision makers may take into account and which may trigger further investigations. On balance the decision maker may come to a view that a person of 15 years of age, with the background and other factors taken into account, is not a genuine business visitor. ... The key test is a subjective test relating to the genuineness of the intention to undertake a short-term business visit. Within that test, a decision maker may well take into account a range of factors, including age.

Another example might be a spouse application where the age differential between the applicant and the sponsor in Australia is very significant. That may well be a very genuine relationship, but the very large age differential may be an appropriate trigger for the decision maker to ask further questions about the genuineness of the relationship. If such migration decisions were not exempt from age discrimination legislation, would it mean that the decision maker could not use that factor as a trigger to ask further questions about the genuineness of the relationship? I do not know the answer to that. I certainly would find it very difficult to understand how you could incorporate those sorts of factors into detailed legislation.

109 Submission 9, pp. 21-22.

3.123 The Department supported DIMIA's view. It added that extensive 'merits' review of migration decisions were available, that that review would not be affected by the bill and that:

The Government considers clause 43 of the Bill to be an appropriate means by which to maintain the integrity of the migration program, particularly in view of the considerable parliamentary and public scrutiny which the program receives.¹¹⁰

Committee view

3.124 The Committee is concerned that the exemption under clause 43 extends an exemption to prohibited conduct to acts not directly mandated by law. However, it considers that the exemption strikes an appropriate balance between eliminating age discrimination and assisting to administer migration law efficiently.

Social security legislation

3.125 Clause 41 proposes to exempt, amongst others, social security legislation from liability under the bill. The Explanatory Memorandum states that:

This exemption recognises that age requirements have particular policy significance in these areas, in the determination of a person's eligibility for payments or services. The objective of such assistance is to provide support to people with particular needs, being both economic and social assistance. The programs developed are designed to take into account the different needs and circumstances of different age groups, such as young children, youth, parents with children below certain ages and people over the relevant age requirement for eligibility for the age pension.¹¹¹

3.126 However, the YWCA advanced the view that social security legislation contains a number of instances of age discrimination which they believe are without a sound policy basis. The provided examples:

The lower levels of payments for Youth Allowance and New Start recipients as opposed to the pension use age a blunt instrument to assess capacity and need and leave many young people living below the poverty line. Further the payment of rent assistance to students on Youth Allowance as opposed to students on Austudy is a difference purely determined by the age of the recipient when they began tertiary study. The differences in access to rent assistance again use age as an arbitrary line.¹¹²

110 *Submission 10.*

111 Explanatory Memorandum, p. 54.

112 *Submission 5*, p. 3; see also *Committee Hansard*, 9 September 2003, p. 2.

Committee view

3.127 The Committee considers the exemptions in clause 41 an appropriate practical balance between providing protection against age discrimination and exempting circumstances in which age-based distinctions are legitimate.

Positive discrimination exemption

3.128 Clause 33 generally provides an exemption for positive discrimination. Similar exemptions are found in other Commonwealth anti-discrimination.

3.129 However, HREOC is concerned that clause 33 extends the exemption beyond that provided by other anti-discrimination law. Unlike positive discrimination exemptions in other Commonwealth anti-discrimination law, clause 33 does not require the acts to be reasonably intended to address the need or disadvantage¹¹³:

The Commission is of the view that any extension of the current understanding of a special measures provision may undermine the objective of the proposed legislation to eliminate age discrimination. ... If clause 33 remains in its current form, it is suggested that consideration be given to some form of limitation being included, such as the reasonableness of the measure.¹¹⁴

Committee view

3.130 The Committee considers the exemptions in clause 33 an appropriate practical balance between providing protection against age discrimination and exempting circumstances in which age-based distinctions are legitimate.

Other issues

3.131 Other issues raised by submissions and witnesses included:

- the overlap of protection from age discrimination with protection from disability discrimination;
- relatives and associates;
- harassment; and
- gay, lesbian, bisexual, transgender and intersex issues.

113 See section 45 of the *Disability Discrimination Act 1992*; see also section 7D of the *Sex Discrimination Act 1984*.

114 *Submission 9*, p. 11; see also *Committee Hansard*, 9 September 2003, p. 13.

Overlap with disability discrimination

3.132 Clause 6 provides that a reference to discrimination against a person on the grounds of age is taken not to include a reference to discrimination against a person on the grounds of a disability of the person. The Explanatory Memorandum states that:

This provision ensures that the Act does not create a second or alternative avenue for complaints of disability discrimination where such complaints are properly covered by the DDA [*Disability Discrimination Act 1992*]. Complaints of age discrimination that would also be covered by the DDA should be dealt with under the legislative regime established by that Act.¹¹⁵

3.133 The ALHR opposed clause 6 on the basis that people should be able to retain the option of complaining about either form of discrimination and that this option would be consistent with other Commonwealth anti-discrimination law.¹¹⁶

3.134 Also, HREOC was not convinced that the bill needed to include specific provisions dealing with the overlap. They stated that any overlap could be dealt with under their existing complaint assessment process.¹¹⁷ This process effectively deals with complaints of multiple grounds of discrimination under the different aspects of Commonwealth anti-discrimination legislation. However, the Hon. John von Doussa conceded that they were unable to convincingly argue that to leave the clause in the bill would cause any great harm.¹¹⁸

Committee view

3.135 The Committee considers that clause 6 is appropriate to provide certainty in relation to matters that involve disability and age discrimination issues.

Relatives and associates

3.136 The bill in its current form does not specifically prohibit discriminatory conduct because of the age of a person's relative or associate. ACOSS, COTA, ALHR and HREOC argued for such a prohibition:¹¹⁹

... for example, to refuse employment to a person on the grounds that she/he has a spouse whom the prospective employer considers will require care because of his/her age. ... A person should not be denied an opportunity because of the age of her/his associate or relative.¹²⁰

115 Explanatory Memorandum, pp. 38-39.

116 *Submission 8*, p. 7.

117 *Submission 9*, pp. 13-14.

118 *Committee Hansard*, 9 September 2003, p. 14.

119 *Submission 6*, p. 6; *Submission 7*, p. 4; *Submission 8*, p. 2; *Submission 9*, p. 19.

120 COTA, *Submission 6*, p. 6.

3.137 The Department's information paper commented that:

Employer organisations expressed concern about the application of this extended ground of age discrimination to the employment field.¹²¹

3.138 HREOC commented that the prohibition of discrimination against relatives and associates exists in other anti-discrimination law, was uncontroversial and had not given rise to a large number of complaints.¹²² The Hon. John von Doussa pointed to similarities to family responsibilities in the Sex Discrimination Act and provided examples of discrimination:

... a single mother seeking to lease premises and who is discriminated against because she has a child. ... Or you may find someone seeking to lease premises being discriminated against because they have elderly parents with them who are not perceived to be desirable in a particular establishment.¹²³

3.139 Ms Ann Wentworth from the COTA added that:

we are concerned that, if a person's partner is older, when it comes to employing that person they will think, 'We can't employ this person, because they'll just take time off to look after their partner.' It reminds me of the debate that used to go on about whether women could employed, because we may or may not get pregnant.¹²⁴

Committee view

3.140 The Committee is concerned that the aim of achieving attitudinal change may be undermined by not extending age discrimination to discriminatory acts on the basis of relatives and associates.

Recommendation 5

The Committee recommends that a new provision be inserted to extend discrimination on the basis of the age of an aggrieved person's relative or associate.

Harassment

3.141 Unlike other Commonwealth anti-discrimination law, the bill does not prohibit harassment based on age. The Department's information paper observed that

121 Attorney-General's Department, *Information Paper – Proposals for Commonwealth Age Discrimination Legislation*, December 2002, p. 11.

122 *Submission 9*, p. 19.

123 *Committee Hansard*, 9 September 2003, p. 14.

124 *Committee Hansard*, 9 September 2003, p. 5.

only the Northern Territory *Anti-Discrimination Act 1992* prohibited harassment in relation to age. The paper noted the arguments for and against such a prohibition:

Employers and business groups felt that the concept was too vague and could cause spurious complaints about legitimate workplace requirements. It was noted that State legislation does not generally prohibit harassment other than sexual harassment. However, other groups expressed the view that age-based harassment was a significant problem in the workplace and should be specifically prohibited, not left to be treated as less favourable conduct within the general prohibition of discrimination.¹²⁵

3.142 The ALHR supported protection against age-based harassment.¹²⁶

Committee view

3.143 The Committee considers that not providing an offence of harassment is consistent with the bill's objective of achieving attitudinal change.

Gay, lesbian, bisexual, transgender and intersex issues

3.144 Ms Jo Harrison, in her private capacity, urged the government to

canvass as many options as possible across all areas of GLBTI [gay, lesbian, bisexual, transgender and intersex] ageing ... Without such action, [the bill] will exclude this most vulnerable group of elderly people in Australia from genuine access to mechanisms which redress discrimination.¹²⁷

Committee view

3.145 The Committee received little evidence on this issue and considers that this issue is more appropriately canvassed in Australia's laws aimed at prohibiting discrimination on the grounds of sexuality and gender identity.

Senator Marise Payne

Chair

125 Attorney-General's Department, *Information Paper – Proposals for Commonwealth Age Discrimination Legislation*, December 2002, p. 38.

126 *Submission 8*, p. 6.

127 *Submission 1*, p. 9.

DISSENTING REPORT BY ALP SENATORS

Overview

1.1 In principle, the ALP supports the bill's aim of eliminating age discrimination. However, we are concerned that aspects of this bill are ill-considered and that the Howard Government has effectively hamstrung HREOC's proposed education and complaint handling functions.

Dominant reason for conduct - impractical

1.2 We are concerned that the Howard Government has proposed a 'dominant reason' test in this bill. Prior experience has shown this test to be impractical in the area of anti-discrimination law. In fact, the test was removed from the Racial Discrimination Act in 1990 because of HREOC's significant concerns with the test.

1.3 We are also concerned that a fundamental change to anti-discrimination law has been proposed by the Howard Government without any external consultation. In our view, this change seriously undermines the object of eliminating age discrimination.

1.4 We agree with the Committee that a more stringent test than other anti-discrimination law signals to the community the lesser importance of age discrimination when compared with other prohibited discriminatory conduct. However, we are of the view that this can only be avoided by replacing the proposed test with the test that is used in other Commonwealth anti-discrimination law.

Recommendation

We recommend that clause 16 be replaced with a provision, similar to section 8 of the *Sex Discrimination Act 1984*, that specifies where an act is done for two or more reasons and one reason is the age of a person, then the act will be taken to be done for the reason of the age of a person whether or not that reason was the dominant or substantial reason for doing the act.

Exemptions – need to be curtailed

1.5 We are concerned that the exemptions under the bill are too wide and in some cases unjustifiably so. The breadth of these exemptions should be curtailed and reconsidered. We do not agree that permanent blanket exemptions are a balanced proposal. In our view, a more appropriate balance would be either to allow for the opting out through regulation or by further consideration of the areas of exemptions and the scope of those exemptions.

Recommendation

We recommend that the exemptions to liability for age discrimination be reviewed in two years to ensure that they remain necessary with the onus on the Government to prove their ongoing need.

HREOC's resourcing – inadequate

1.6 The Howard Government has not committed enough resources to HREOC to allow them to fulfill expectations. Based on the workload in other jurisdictions, age discrimination is expected to become 10 percent of its complaints workload. Also, an intensive education campaign is expected. However, no additional funding has been committed. We do not agree that the Government be asked to 'further reconsider' additional funding but that the Government should actually provide that funding.

Recommendation

We recommend that the Human Rights and Equal Opportunity Commission be provided with adequate funding to fulfil its increased responsibilities and expectation under the bill.

Harassment – prohibition needed

1.7 We are concerned that the Bill does not include a specific prohibition on age-based harassment. As the Department's information paper noted, the Northern Territory Anti-Discrimination Act 1992 includes such a prohibition. We consider that federal human rights legislation should embody the best protections against unlawful discrimination and that a prohibition on aged-based harassment would be useful in addressing what was drawn to the attention of the Department as a significant problem in the workplace. The Australian Lawyers for Human Rights supported such a prohibition, noting:

Failure to provide specific protection against harassment will force parties to re-argue what is already settled law in this country.¹

1 *Submission 8*, p. 9.

Recommendation

The Bill be amended to include a specific prohibition on aged-based harassment.

Senator the Hon. Nick Bolkus

Australian Labor Party

Deputy Chair

Senator Joseph Ludwig

Australian Labor Party

Senator Linda Kirk

Australian Labor Party

ADDITIONAL COMMENTS AND POINTS OF DISSENT BY SENATOR BRIAN GREIG ON BEHALF OF THE AUSTRALIAN DEMOCRATS

1.1 The Australian Democrats welcome the introduction of Age Discrimination Legislation by the Government - it is long overdue. Freedom from discrimination on the basis of age is a fundamental human right and we are pleased that this right will finally be afforded legislative protection at a Federal level.

1.2 The Democrats agree with a number of the observations and recommendations set out in the Chair's report. In particular, we would like to expressly indicate our support for the recommendations concerning additional funding for the Human Rights and Equal Opportunity Commission (HREOC) and the extension of age discrimination to include discrimination on the basis of the age of a person's relative or associate.

1.3 However, on a range of other issues, the Democrats disagree with the Committee's view and recommendations. These issues are set out below, as are our alternative recommendations.

Dominant reason test

1.4 The Democrats are strongly opposed to the dominant reason test as a basis for demonstrating age discrimination. Although we agree with the Committee's view on this issue, we feel that the Committee's recommendation does not go far enough. It is insufficient for the Government to merely define the meaning of "dominant reason". Instead, the dominant reason test should be replaced with a provision similar to the test contained in section 8 of the Sex Discrimination Act 1984, which indicates that an act is discriminatory if it was committed for two or more reasons one of which was discriminatory, whether or not the discriminatory reason was the dominant or substantial reason for doing the act.

1.5 Such an amendment would not only bring the Bill into line with other Commonwealth anti-discrimination legislation, but would also have symbolic significance by making it clear that the Parliament does not view age discrimination as any less important than other forms of discrimination.

Recommendation 1

That the dominant reason test as a basis for establishing age discrimination be replaced with a test similar to that contained in section 8 of the Sex Discrimination Act 1984.

Discrimination in relation to unpaid work

1.6 The Democrats believe that the Bill should be extended to prohibit discrimination in relation to unpaid work. We note that this was advocated by the Australian Nursing Federation, COTA, ACOSS and the ALHR. Restricting the prohibition against age discrimination to the paid workforce is inconsistent with the underlying objects of the Bill.

Recommendation 2

That the Bill be amended to extend the prohibition against discrimination to unpaid work.

Youth wages

1.7 The Democrats have long opposed the concept of youth wages and do not believe that they should be exempted from the Bill.

1.8 As we have previously argued, young people are required to pay the same amount for food, rent and clothing as other Australians and only full-time students have access to public transport and other concessions.

1.9 Moreover, the Democrats believe it is unjustifiable to, on the one hand, confer 18 year olds with the same rights and responsibilities as other adults – including the right to vote, to consume alcohol, to drive, and full responsibility for their actions under the law – yet on the other hand, to pay them less for performing the same duties as other adults.

1.10 Youth wages convey the implicit message that work undertaken by young people is less valuable than work undertaken by older people. They suggest that the worth of a worker is to be determined according to age, rather than skills, training or experience. They represent a fundamental contravention of the principle of equal pay for equal work, which is enshrined in international and human rights conventions to which Australia is a signatory, including the Universal Declaration of Human Rights.

1.11 Youth wages are inherently discriminatory and the policy justifications advanced in their favour are unconvincing. The Democrats do not believe that reducing the pay of young Australians is the way to create job opportunities for them.

1.12 For all of these reasons, the Democrats take the view that youth wages should not be exempted from the prohibition against age discrimination.

Recommendation 3

That the Bill be amended to remove the exemption in relation to youth wages.

Inherent requirements of the job

1.13 The Democrats have concerns regarding the exemption relating to the inherent requirements of the job. We note the argument made by ACOSS that:

1.14 “Negative stereotypes inform many people’s assumptions and attitudes about inherent requirements of positions which in most cases cannot be justified by resort to evidence or data”.

1.15 While the Democrats concede that the inherent requirements of particular positions may make them unsuitable for persons of a particular age, we believe that this should be determined on a case by case basis. In this respect, we agree with the ALHR that the ‘inherent requirements of the job’ should operate as a defence, rather than a general exemption from the legislation.

Recommendation 4

That the exemption relating to the inherent requirements of the job be removed from the Bill, but that there be a defence based on the inherent requirements of the job available to those who face allegations of age discrimination.

Industrial awards and workplace agreements

1.16 The Democrats oppose the exemption relating to industrial awards and workplace agreements. This exemption will fundamentally undermine one of the key objectives of the Bill, namely prohibiting age discrimination in the workplace.

1.17 The exemption will facilitate discrimination in the workplace, provided it is in accordance with a workplace agreement. There is nothing to stop employers from seeking to enter into inherently discriminatory agreements with their employees. Given the power imbalance which often characterises the employer/employee relationship, particularly where the employee is a young person, this leaves considerable scope for the prohibition against age discrimination to be circumvented by employers.

1.18 The Democrats agree with COTA that existing awards and agreements be subject to a two-year exemption from the legislation so that they can be reviewed and, if necessary, varied in order to ensure their compliance, after which time the exemption will be removed.

Recommendation 5

That the exemption relating to industrial awards and workplace agreements be limited to a period of two years from the date on which the legislation comes into operation.

Office of Age Discrimination Commissioner

1.19 The Democrats disagree with the Committee's view on the Bill's failure to establish an office of Age Discrimination Commissioner. We take the view that the Government's failure to establish a specialist office significantly diminishes its purported commitment to prevent age discrimination.

1.20 The primary reason advanced by the Government for its decision not to establish a specialist office in relation to age discrimination is that this is consistent with the proposed reforms to HREOC.

1.21 The Chair's report notes that this is also "consistent with the Committee's recommendations in its report on the HREOC bill". However, it must be pointed out that the Chair's report did not reflect the position of the Australian Labor Party, the Australian Democrats or the Australian Greens, who submitted a joint dissenting report.

1.22 Given the position of the opposition parties, it appears unlikely that the Senate will pass the Government's proposed reforms to HREOC. This state of affairs means that the Government's primary argument against establishing an Age Discrimination Commissioner is baseless.

1.23 In the course of both this inquiry and the inquiry into the HREOC bill, the Committee has been presented with a great deal of evidence regarding the value of specialisation within HREOC. For example, in its submission regarding the HREOC bill, ACOSS argued:

"Specialist Commissioners provide a public point of identification not only for individuals and for communities of interest such as population-specific community organizations, academics and researchers, specialist lawyers etc. Over time specific laws have been enacted relating to these areas of Discrimination".

1.24 Similarly, the Catholic Commission for Justice, Development and Peace (Melbourne) made the point that:

"Thematic Commissioners have been outstanding in their role in community education – Individuals strongly identified with particular areas of fighting discrimination are required with specific portfolios to allow them to speak with authority".

1.25 The Democrats find the arguments in favour of specialist offices persuasive and firmly believe that the current specialist offices should be retained as an integral part of HREOC.

1.26 Moreover, we believe that there is a strong case for the establishment of an Age Discrimination Commissioner under this Bill. Clearly, specialist commissioners play an important educative role within the community. Given that one of the express objects of this Bill is "to promote recognition and acceptance within the community of

the principle that people of all ages have the same fundamental rights”, the Democrats believe that an Age Discrimination Commissioner must be established.

1.27 Finally, if the current specialist offices within HREOC are retained, as seems likely, the absence of an Age Discrimination Commissioner within HREOC would carry the implicit message that addressing discrimination based on age is less important than addressing other forms of discrimination.

Recommendation 6

That the Bill be amended to provide for the establishment of an Age Discrimination Commissioner within the Human Rights and Equal Opportunity Commission.

General exemptions

1.28 Division 4 of the Bill contains a number of general exemptions.

1.29 The Democrats oppose the exemptions relating to the provision of credit and to anything done in relation to the administration of Commonwealth migration and immigration laws.

1.30 HREOC has raised an important concern relating to the terms in which the exemption relating to positive discrimination has been articulated. HREOC notes that the structure of this exemption differs from that of corresponding exemptions in other Commonwealth anti-discrimination legislation, in that it does not require the acts to be reasonably intended to address the need or disadvantage.

1.31 The Democrats accept HREOC’s argument that this definition of positive discrimination in this Bill “may undermine the objective of the proposed legislation to eliminate age discrimination”. Accordingly, we agree that proposed section 33 should be amended to include a requirement that the act is reasonably required to meet the need or disadvantage.

1.32 The Democrats reserve our position in relation to the remaining general exemptions.

Recommendation 7

That the exemption relating to the provision of credit be removed from the Bill.

Recommendation 8

That the exemption for acts done in relation to the administration of migration and immigration laws be removed from the Bill.

Recommendation 9

That proposed section 33 of the Bill be amended to include a requirement that the act is reasonably required to meet a need of, or reduce a disadvantage experienced by, people of a particular age.

Overlap with disability discrimination

1.33 The Bill includes specific provisions to address the potential overlap between age discrimination and disability discrimination. Clause 6 provides that, for the purposes of the legislation:

1.34 “a reference to discrimination against a person on the ground of the person’s age is taken not to include a reference to discrimination against a person on the ground of a disability of the person (within the meaning of the Disability Discrimination Act 1992)”.

1.35 The Democrats see no justification for the inclusion of such a provision in the Bill. We believe that a person who has been discriminated against should have the opportunity to pursue a remedy under either piece of legislation. As HREOC indicated, it is well equipped to deal with any overlap between the two forms of discrimination since its existing complaints process allows for the determination of complaints relating to multiple grounds of discrimination.

Recommendation 10

That proposed section 6 be removed from the Bill.

Harassment

1.36 The Bill fails to include any prohibition against harassment on the basis of age. In this respect, it differs from other Commonwealth anti-discrimination legislation. ACOSS and the ALHR argued that the Bill should include such a provision. The Democrats agree. We believe the Commonwealth has a responsibility to provide legislative protection against harassment on the basis of a person’s age. What conduct will amount to such harassment should be clearly defined.

Recommendation 11

That the Bill be amended to include a clearly defined prohibition against harassment on the basis of age.

1.37 Subject to the foregoing recommendations, the Democrats support the passage of this Bill.

**Senator Brian Greig
Australian Democrats**

APPENDIX 1

SUBMISSIONS RECEIVED

Submission No.	Submitter
1	Ms Jo Harrison
2	Mr Abraham Sher
3	Australian Nursing Federation
4	Australian Chamber of Commerce and Industry
5	YWCA of Australia
6	COTA National Seniors Partnership
7	Australian Council of Social Service
8	Australian Lawyers for Human Rights
9	Human Rights and Equal Opportunity Commission
10	Attorney-General's Department

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra Tuesday 9 September, 2003

YWCA

Ms Erica Lewis, Policy & Research Officer

Ms Evelyn Loh, Member National Executive Committee

COTA National Seniors Partnership

Ms Ann Wentworth, Member National Policy Council

Mr John Brook, Member National Policy Council

Australian Chamber of Commerce and Industry

Mr Peter Anderson, Director – Workplace Policy

Human Rights and Equal Opportunity Commission

The Hon John von Doussa QC, President

Ms Rocky Clifford, Director Complaint Handling Section

Attorney-General's Department

Mr James Faulkner, Assistant Secretary

Ms Julie Atwell, Acting Principal Legal Officer

Department of Immigration and Multicultural and Indigenous Affairs

Mr Abdul Rizvi, First Assistant Secretary

Mr Doug Walker, Assistant Secretary