

61 2 9310 4822



2 September 2003

Ms Louise Gell  
Acting Secretary  
Legal and Constitutional References Committee  
Australian Senate  
Parliament House  
CANBERRA ACT 2600



Dear Ms Gell,

Thank you for your correspondence of 14 August 2003 inviting submissions on the provisions of the Age Discrimination Bill 2003. We received your correspondence on the 18<sup>th</sup> of August and have found it difficult to comply with the two week timeframe for comments. We regret that this submission has been lodged after the due date and hope that the Committee will consider the comments below.

In December 2002 the Attorney General's Department released an information paper on the proposed legislation. ACOSS responded with a short submission on 12 February 2003 (see attached).

ACOSS welcomes the Bill and strongly support its objects. We support many of the provisions of the Act but believe that it could be improved in a number of ways.

We outline each of these below.

## Definitions

### **"Inherent requirements based on age"**

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-inforcing these assumptions by protecting the notion of inherent requirements based on age, as is the case in numerous sections (for example Division 2 Sections 18 -24) it would be preferable for the Bill to require them to be subject to scrutiny by the Commission. For a two year period at the commencement of the legislation, employers could be required to lodge with the Commission the reasons for positions being restricted to certain groups on the basis of inherent requirements based on age. The Commission would not be required to determine these matters but would instead review the material collected at the end of the two year period to ascertain whether or not the concept of 'inherent requirements based on age' is used appropriately or as a screen for discriminatory practices.

### **Judgements based on "other relevant factors"**

A number of sections of the Bill exempt discrimination based on statistical or actuarial data or "other relevant factors." While we agree with exemptions in the case of evidence or statistical or actuarial data, "other relevant factors" is a broad and subjective expression and decisions taken on this basis may well be based on false assumptions or negative age stereotypes. Rather than being included within

Australian Council  
of Social Service

Level 2  
619 Elizabeth St  
Redfern

Locked Bag 4777  
Strawberry Hills  
NSW 2012

Ph [02] 9310 4844

61 2 9310 4822

the automatic exemptions of the Bill these "relevant factors" should be at the discretion of the Commission to ensure that over time a range of such factors are either exposed as unlawful discrimination or upheld as relevant matters on the basis of public deliberation not continuance of unquestioned discrimination.

### **General exemptions**

Division 4 of the Bill includes 11 sections setting out general exemptions from the Bill. We believe that the extent of these general exemptions compromises the intentions of Government and the objects of the Bill which seek to make age discrimination unlawful, to remove barriers to participation and to change negative stereotypes about age.

There are 48 laws which will be exempted from the provisions of this Bill under subsection 39 (1). We disagree with the automatic exemptions of so many existing laws. Each law should be reviewed to determine whether any age based distinctions are justifiable, or whether it should be amended to eliminate its age discriminatory intent or effect.

Most if not all of these laws outlined in Schedule 1 could be included in the sunset provision of subsection 39 (2).

### **Youth wages (Section 25)**

ACOSS is opposed to this exclusion. The idea of lower pay for equal work is clearly discriminatory and a breach of Australia's obligations under the Convention on the Rights of the Child. Youth wages can also lock older workers out of entry level and trainee positions. ACOSS believes that youth wages should be replaced with a competency based wage system.

### **Charities, religious and voluntary bodies (Sections 34, 35 and 36)**

ACOSS notes that the legislation does not make it unlawful for a charitable, religious or voluntary body to discriminate against a person in relation to age in connection with the conferring of a charitable benefit, an act that conforms to the tenets of religious doctrine, the admission of persons as members of a voluntary body or the provision of benefits, facilities or services to *members* of a voluntary body.

Our main concern in each of these areas is to ensure that such organisations are not permitted to discriminate on the basis of age in connection with the provision of what might be regarded as a public benefit, facility or service, or the employment of people for the purpose of delivering that benefit, facility or service. By public benefit, facility or service we mean any benefit, facility or service which the Commonwealth Government (or other body) has contracted or otherwise engaged a voluntary, religious or charitable organisation to undertake on behalf of the Commonwealth (or other body).

We have a further particular concern in relation to voluntary organisations being generally exempted given the extent to which people of all ages (but particularly older people) are engaged in the activities of voluntary organisations.

To overcome these problems, the legislation should explicitly state that the provision of public benefits and services provided by charitable, religious and voluntary bodies, and the employment of personnel to deliver these, are covered by the legislation.

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There should be no general exemption for charitable and voluntary organisations; these organisations should instead seek appropriate exemptions from the Commission. A list of determinations should be available to people considering applying for exemptions similar to those provided by the ATO.

### **Superannuation, insurance and credit – actuarial data etc (Section 37) and Superannuation Law (Section 38)**

We agree with COTA/National Seniors that the HREOC recommendations in relation to superannuation legislation should be implemented as follows:

- The Superannuation Industry (Supervision) Act 1993 should be amended to remove the restriction on superannuation funds accepting contributions in respect of members after they reach a certain age.
- The Superannuation Industry (Supervision) Regulations should be amended to remove the requirement that benefits must be compulsorily cashed out when members reach a certain age unless employment tests are met.
- The requirement that members over 70 must be gainfully employed or compulsorily cash out their benefits should be reviewed and alternative means of limiting indefinite deferral of tax treatment explored.
- The Superannuation Guarantee (Administration) Act 1992 should be amended to remove age distinctions (whether young or old) in the requirement for employers to make superannuation contributions for employees.
- All age distinctions in superannuation and related legislation should be evaluated for their necessity in achieving the objectives of superannuation.

In conjunction with these measures, legislative action should be taken to ensure that tax-preferred superannuation investments are used for retirement purposes rather than to boost inheritances:

- Lump sum retirement benefits greater than \$100,000 should be converted into complying pensions or annuities, or taxed at the top marginal tax rate.
- Superannuation benefits should only be transferrable on death of the member to his or her spouse or to a child with a severe disability.

### **Credit (Section 37)**

In relation to provision of credit the existence of actuarial data seems of little relevance unless the debt was to be waived on death or chronic 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 to 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.

### **Migration and citizenship etc (Division 4 Section 43 )**

We do not agree that these Acts should have blanket exemptions on all their provisions but that they should be included in the two-year sunset provision applied to other laws and subject to review of justification of the specific sections that require an exemptions.

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## Other issues

### Relatives and Associates

ACOSS supported the extension of discrimination on the basis of age to include the age of a person's relative or associate.

We argued that where a person (person A) acts on behalf of, or cares for, a relative or associate (person B), and person A is discriminated against on the basis of the age of Person B, it is desirable that the interests of both Person A and Person B should be the subject of legislative protection.

In particular we argued that it would be perverse if the legislation did not protect the rights of people who may have limited capacity to assert their rights due to age by preventing others from effectively acting on their behalf or denying that person access to legal redress for discrimination directed at him or her in caring for, acting for, or being associated with, that other person.

There are specific risks of direct and indirect discrimination against a person who cares for another person because of that other person's age. For example, an employer may decide not to employ a person who has caring responsibilities for a young child or elderly person or may fail to make reasonable adjustments to accommodate the needs of such carers in the workplace.

### Unpaid work

ACOSS believes that age discrimination in voluntary work should be specifically prohibited. While ACOSS previously argued that the definition of employment should be extended for the purposes of the proposed act to include unpaid work (including voluntary work, work experience and internships) we agree that this would not necessarily require extending the definition of employment.

Volunteering Australia noted four key reasons why volunteer work should be included in the proposed legislation as an area in which age discrimination should be prohibited:

1. Discrimination against volunteers does occur;
2. Older Australians will represent an increasing proportion of volunteers (or potential volunteers);
3. The contribution of volunteers should be recognised in tangible ways that are valued by volunteers themselves (including legal protections); and
4. The inclusion of volunteer work would support other government policy objectives that promote community participation and social engagement.

### Harassment

As outlined in the Information Paper, age-based harassment can be a significant problem in the workplace and in other areas of life. ACOSS argued that harassment based on age should be specifically prohibited in the legislation.

ACOSS supports the inclusion of a clear definition of harassment in the Bill to assuage employer concerns about the vagueness of the concept and the risk that spurious complaints will be made about legitimate workplace requirements. This will not remove the need to test the merits of individual cases but will provide clear guidance for risk management as well as the conciliation of disputes.

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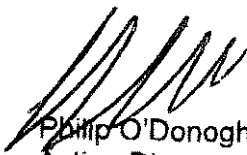
**Systemic investigations**

In its submission to the Attorney General's Information Paper, the Youth Action and Policy Association (NSW) (YAPA) noted that 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 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. The same point holds true for other groups who may struggle to make individual complaints, for example people from culturally and linguistically diverse backgrounds. YAPA recommended that the proposed age discrimination legislation allow for 'representative complaints' to be lodged with HREOC. YAPA also recommended that HREOC be empowered to conduct investigations into systemic age discrimination where there is evidence to suggest that a particular group of people are being discriminated against on the basis of their age, but do not personally want to lodge an individual complaint. For example, HREOC might undertake an investigation into discrimination experienced by young people in public spaces and then proceed by lodging a complaint on their behalf.

ACOSS supports these YAPA recommendations.

Thank you for providing ACOSS with the opportunity to comment on the proposed Bill. We hope that our comments are considered by the Committee as we believe these will substantially strengthen the protection of people exposed to the corrosive effects of age discrimination.

Yours sincerely



Philip O'Donoghue  
Acting Director

61 2 9310 4822



Ms Catherine Hawkins  
Civil Justice Division  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

12 February 2003

Dear Catherine,

Thank you for providing ACOSS with the opportunity to comment on the Information Paper on Proposals for Commonwealth Age Discrimination Legislation.

We have a few brief comments to make on particular sections of the Paper.

**Relatives and Associates (Para 2.2.3)**

ACOSS supports the extension of discrimination on the basis of age to include the age of a person's relative or associate.

*Acting on behalf of another*

Where a person acts on behalf of a relative or associate, it seems clear that the interests of the relative or associate should be the subject of legislative protection.

It would certainly be perverse if the legislation did not protect the rights of people who may have limited capacity to assert their rights due to age by preventing others from effectively acting on their behalf or denying that person access to legal redress for discrimination directed at him or her in acting for, or being associated with, that other person.

*Caring for another*

There are risks of direct and indirect discrimination against a person who cares for another person because of that other person's age. For example, an employer may decide not to employ a person who has caring responsibilities for a young child or elderly person or may fail to make reasonable adjustments to accommodate the needs of such carers in the workplace.

**Unpaid work (Para 4.3)**

ACOSS supports the extension of the definition of employment, for the purposes of the proposed act, to include unpaid work. However, the legislation would need to clearly define the meaning of unpaid work to distinguish between unpaid work at the domestic or informal level (which should not be covered) and unpaid work in a community or formal setting (which should be covered).

ACOSS considers that the impact on volunteers and volunteer organisations will be positive in that it extends desirable protections to volunteers and will promote voluntary action from all sections of the community.

Australian Council  
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Level 2  
619 Elizabeth St  
Redfern

Locked Bag 4777  
Strawberry Hills  
NSW 2012

Ph [02] 9310 4844  
Fax [02] 9310 4822

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**Contract workers (Para 4.4)**

We do not agree with the Government's proposal to cover contract workers to the same extent as existing Commonwealth anti-discrimination laws and believe that the proposed legislation should cover both employed and independent (sole trader) contract workers.

Whether or not the nature and scope of the employment relationship and the situations in which a person is considered to be an employee or an independent contractor is the subject of evolving judicial interpretation, seems to us to be beside the point. From the perspective of protecting people from discrimination on the basis of their age we can see no difference in principle between the case of an employed and independent contractor.

**Harassment (Para 8.1)**

Contrary to the Government's proposal, we believe that harassment based on age should be specifically prohibited in the legislation.

Given that no definition of harassment on the basis of age has been outlined in the Information Paper we do not understand the objections made about the concept being too vague. The Sex Discrimination Act provides a clear definition of harassment and the Disability Discrimination Act does not. ACOSS would favour a clear definition in the proposed Age Discrimination Act to assuage employer concerns about the vagueness of the concept and the risk that spurious complaints will be made about legitimate workplace requirements. This will not remove the need to test the merits of individual cases but will provide clear guidance for risk management as well as the conciliation of disputes.

**Exemption for religious practices, voluntary bodies and charitable benefits (Para 9.3)**

In general, ACOSS supports the exemption of discriminatory acts or practices by religious bodies where the act or practice conforms with the beliefs of the religion and is necessary to avoid injury to the religious sensitivities of adherents to the religion.

However, ACOSS specifically objects to voluntary bodies, including religious organisations, being exempted for discrimination on the basis of age in the provision of what might be regarded as a public benefit, facility or service, or the employment of people for the purpose of delivering that benefit, facility or service. By public benefit, facility or service we mean any benefit, facility or service which the Commonwealth Government has contracted or otherwise engaged a voluntary organisation to undertake on behalf of the Commonwealth.

To the extent that this exemption applies in existing Commonwealth anti-discrimination legislation, ACOSS disagrees with the Government's proposal.

If you have any queries regarding this submission, please contact Gregor Macfie on 02 9310 4844 (ext 211).

Yours sincerely



Megan Mitchell  
Director