

**SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION IN RELATION TO THE
GREY AREAS – AGE BARRIERS TO WORK IN COMMONWEALTH LAWS DISCUSSION
PAPER**

November 2012

Introduction

1. The Employment Law Centre of WA (**ELC**) is a community legal centre that has provided free, confidential employment law advice, education, representation and referrals to many thousands of vulnerable, non-unionised employees in Western Australia since 2001. ELC focuses on issues such as unfair dismissal, unlawful termination, adverse action, underpayment of entitlements, breach of contract, equal opportunity and occupational safety and health.
2. ELC provided an interim submission (**ELC's Interim Submission**) to the Australian Law Reform Commission (**ALRC**) in relation to the *Grey Areas – Age Barriers To Work In Commonwealth Laws* issues paper. That submission is **attached** as Appendix 1.
3. Having now considered the ALR's *Grey Areas – Age Barriers To Work In Commonwealth Laws* subsequent discussion paper (**ALRC Discussion Paper**), ELC's views remain the same as those outlined in ELC's Interim Submission, with the following additional comments as set out below.

ELC's additional comments in relation to the ALRC Discussion Paper

Flexible working arrangements

4. ELC supports Proposal 2-5 set out in the ALRC Discussion Paper that the Australian Government amend section 65 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) to extend the right to request flexible working arrangements to all employees who have caring responsibilities.

Notice of termination of employment

5. ELC supports Proposal 2-8 set out in the ALRC Discussion Paper that the Australian Government consider amending section 117(3)(b) of the Fair Work Act to increase the minimum period of notice provided to an employee over 45 years of age who has completed at least two years of continuous service from one week to four weeks.
6. As set out in ELC's Interim Submission, an increase in the minimum period of notice would reflect the greater difficulty that older employees may encounter in finding alternative employment.

Limitation period for unfair dismissal claims

7. In ELC's Interim Submission, ELC commented on the 14 day limitation period for unfair dismissal claims and noted the difficulties that this very short limitation period presents, particularly for vulnerable, low-income employees – including mature age employees.

8. ELC notes that since ELC's Interim Submission was drafted, the *Fair Work Amendment Bill 2012* (Cth) (**Fair Work Amendment Bill**) has passed through the House of Representatives and is currently being considered by the Senate.
9. Under the Fair Work Amendment Bill, the limitation period for unfair dismissal claims has been increased from 14 days to 21 days.
10. ELC supports the increase in the unfair dismissal limitation period, however, in ELC's view, this limitation period is still too short.
11. ELC is concerned that many employees with legitimate unfair dismissal claims will be prevented from seeking any redress in circumstances where they have been unfairly dismissed merely due to the short limitation period. This is evidenced in ELC's statistics. For instance, in the 2011 calendar year alone, at least 71 callers contacted ELC for advice on unfair dismissal more than 21 days after they had been dismissed.
12. ELC notes that there is some provision in the Fair Work Act for claims to be accepted outside the relevant limitation period. However, in practice, out-of-time claims are rarely accepted.
13. In ELC's view, the short limitation period for unfair dismissal claims could have a particularly harsh effect on mature age employees who have been unfairly dismissed – many mature age employees will be prevented from seeking any redress and will also face greater difficulty in finding alternative employment.
14. ELC recommends that the limitation period for unfair dismissal be extended, ideally to 90 days (in line with other comparable jurisdictions), or alternatively to 60 days (in line with the existing general protections limitation period).

Limitation period for general protections claims

15. In addition to the change to the limitation period for unfair dismissal claims, the Fair Work Amendment Bill decreases the limitation period for general protections claims involving a dismissal from 60 days to 21 days.
16. In ELC's view, this proposed change is highly undesirable and should be rejected. ELC is concerned that large numbers of employees – including mature age employees – will be prevented from making general protections claims merely because of the short limitation period.
17. As noted above, ELC's statistics indicate that large numbers of employees who seek advice where they have been dismissed only do so more than 21 days after they have been dismissed. Although the statistics cited above are for unfair dismissal matters, it is likely that the same would be true for general protections matters.
18. General protections claims involve very serious breaches of the Fair Work Act – not only is the employer's behaviour considered unfair, it is unlawful. The general protections provisions deal with the situation, for example, where an employee is dismissed because of his or her age, race, ethnicity, sex, or pregnancy, or is dismissed because he or she made a complaint about bullying.
19. ELC considers that it is highly undesirable that employees who are the subject of such conduct are prevented from making a claim simply because they were unable to do so within the short time-frame required.

20. As with unfair dismissal claims above, the proposed short limitation period for general protections claims may have a particularly harsh effect on mature age employees who face greater difficulty in finding alternative employment.
21. ELC recommends that the limitation period for general protections claims involving a dismissal either be increased to 90 days (in line with our recommendation above that the limitation period for unfair dismissal claims be increased to 90 days), or be left at 60 days.

APPENDIX 1



INTERIM SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION IN RELATION TO THE GREY AREAS – AGE BARRIERS TO WORK IN COMMONWEALTH LAWS ISSUES PAPER

Introduction

1. The Employment Law Centre of WA (**ELC**) is a community legal centre (**CLC**) that has provided free, confidential employment law advice, education, representation and referrals to many thousands of vulnerable, non-unionised employees in Western Australia since 2001. ELC focuses on issues such as unfair dismissal, unlawful termination, adverse action, underpayment of entitlements, breach of contract, equal opportunity and occupational safety and health.
2. Between 1 July 2010 and 30 June 2011, ELC assisted 589 callers over 45 years of age. Three hundred and eighty of those were aged between 46 and 55 years, 168 were aged between 56 and 65 years, 35 were aged between 66 and 75 years and 6 were over 76 years of age. Most required advice and assistance in relation to termination of employment and underpayment of entitlements including long service leave, notice of termination and redundancy.

Summary of submissions

3. ELC provides this interim submission to the Australian Law Reform Commission as a preliminary response to the Grey Areas – Age Barriers to Work in Commonwealth Laws issues paper. ELC intends to provide a more comprehensive submission in response to the Australian Law Reform Commission discussion paper due for release later in 2012.
4. ELC provides comments only in relation to the questions in the issues paper identified below and not to the issues paper in its entirety.

ELC's response to the issues paper

*Question 35 – Should s 65 of the Fair Work Act 2009 (Cth) (**FW Act**) be amended to include age as a basis upon which an employee may request flexible working arrangements?*

5. ELC supports the amendment of the National Employment Standards (**NES**)¹ to include carer's responsibilities, rather than age, as a basis upon which an employee may request flexible working arrangements.

¹ Fair Work Act 2009 (Cth), Part 2-2

Question 36 – In practice, do mature age employees negotiate individual flexibility arrangements made under s 202 of the FW Act? Are such arrangements a useful and appropriate flexibility mechanism for mature age employees?

6. ELC does not collect statistical data in relation to individual flexibility arrangements made under s 202 of the FW Act (**IFA**). In ELC's view, whether an IFA would provide a useful and appropriate flexibility mechanism for a mature age employee would likely depend on the individual, their skill set and their bargaining power relative to the employer.

Question 37 – In practice, how effective are the general protections provisions under the FW Act where a mature age employee, or prospective employee, has been discriminated against on the basis of age?

7. ELC submits that aspects of the general protections provisions under the FW Act are potentially effective in relation to a mature age employee, or prospective employee, who has been discriminated against on the basis of age. In particular, the following features of the general protections provisions may increase the effectiveness of the provisions for such an employee:

- the reverse onus of proof in a general protections claim under s 361 of the FW Act;
- the limitation on costs that may be awarded in relation to a general protections claim under s 570 of the FW Act;
- potential involvement of the Fair Work Ombudsman in assisting with a general protections claim under Part 5-2 of the FW Act;² and
- the availability of injunctive relief under s 545 of the FW Act.

8. However, for vulnerable, low income mature workers, the general protections provisions may be of limited assistance due to the significant difficulties associated with running a matter in the Federal Magistrates Court (**FMC**) or Federal Court (**FC**) as a self-represented litigant and the cost of other fees associated with a FMC or FC claim. In particular:

- FC and FMC claims involve procedural requirements that are likely to be daunting to a self-represented litigant;
- the lower filing fee applicable to general protections claims³ applies only to claims involving a dismissal, with general protections claims not involving a dismissal attracting general court filing fees;⁴
- further fees, including mediation and videoconferencing fees, may apply in particular circumstances.

9. ELC's experience is that clients generally find a discrimination claim under the *Equal Opportunity Act 1984* (WA) (**EO Act**) through the Equal Opportunity Commission (WA) more manageable than a general protections discrimination claim.

Further comments on age barriers to work for mature age workers

² in particular, s 682 and Part 5-2 Division 3(C) of the FW Act.

³ Currently \$62.40.

⁴ Currently \$426 in the FMC.

10. ELC's position is that the existing legal protections and federal government incentives provide reasonable protection to mature age workers in relation to employment and job-seeking.
11. ELC supports law reform that aims to prolong the retention of mature age workers in the workforce and preserve choice and dignity for older workers. ELC submits the following comments in relation to law reform initiatives that may benefit such an objective.

Notice period

12. Currently, a worker over 45 years of age is entitled to an additional one week's notice upon termination of their employment by their employer provided that they have completed the necessary minimum period of employment with the employer.⁵ ELC proposes that this minimum additional entitlement to notice for older employees be increased to reflect the greater difficulty that an older worker may encounter in finding alternative employment.
13. ELC also proposes removing the requirement that a worker over the age of 45 years complete a minimum period of service prior to qualifying for this additional notice entitlement.

Age of employee as mandatory relevant consideration in assessment of an unfair dismissal claim

14. ELC proposes that the age of an employee at the time of dismissal be included in the FW Act at s 387 as a mandatory relevant consideration in assessing whether the employee's dismissal has been harsh, unjust or unreasonable, to reflect the greater harshness that may be encountered by a worker dismissed after many years of service and/or the difficulty that an older employee may encounter in finding alternative employment.

Conciliation conferences in relation to general protections claims

15. Currently, conciliation conferences in relation to general protections claims under the FW Act are only compulsory where the claim relates to a dismissal from employment.⁶ ELC's experience is that conciliation conferences are effective in assisting vulnerable, self-represented litigants to successfully resolve claims.
16. ELC proposes that s 374 of the FW Act be amended so that conciliation conferences become mandatory for all general protections claims. This will have the effect of preventing employers from avoiding conciliation by exercising their current right to not consent to a conciliation conference under s 374 of the FW Act.

Increasing limitation period for unfair dismissal claims

17. Currently, an unfair dismissal application must be lodged within 14 days of the date of dismissal becoming effective.⁷ While an application may be made out-of-time, late applications may only be accepted in exceptional circumstances.⁸ ELC's experience is that the limitation period is strictly applied by Fair Work Australia and out-of-time applications are not often successful.

⁵ Currently 2 years' continuous service.

⁶ FW Act, ss 365, 374.

⁷ FW Act, s 394.

⁸ FW Act, s 394.

18. The short limitation period for unfair dismissal claims presents difficulties for vulnerable, low-income workers who may be unaware of legal remedies available to them in relation to unfair dismissal, who do not have immediate access to legal advice. Further, the strict criteria applied to out-of-time applications limits the opportunities available to such applicants to exercise their right to unfair dismissal remedies.
19. ELC proposes that the limitation period for unfair dismissal claims as set out in s 394(2) of the FW Act be increased.
20. Further, ELC proposes that the requirement of exceptional circumstances in the consideration of out-of-time unfair dismissal applications as set out in s 394(3) of the FW Act be removed in recognition of the difficulty that the short limitation period provides for vulnerable, low-income earners who may be unaware of their rights and unable to readily access prompt legal advice.

Long Service Leave

21. ELC proposes decreasing the length of service required by older workers before entitlement to access long service leave arises. Such reform is intended to reflect the increased difficulty that an older worker who has changed employers at a later stage in their career, or returned to the workforce as a mature age worker, may have in meeting the length of service requirements necessary to accessing long service leave.
22. Further, ELC broadly supports the extension of portable long service leave schemes to a wider range of industries.

Reverse onus of proof for unfair dismissal and EO Act discrimination claims

23. ELC's experience is that the onus of proving unfair dismissal or discrimination under the EO Act can create barriers to vulnerable, low-income employees.
24. ELC proposes reform to Part 3-2 of the FW Act (unfair dismissal) to create a presumption of the employer's reasons for dismissal as alleged unless proved otherwise, similar to the protection provided to employees under s 361 of the FW Act in relation to general protections claims.
25. ELC proposes similar reforms to the EO Act to create a presumption of prohibited discrimination by the employer unless proven otherwise.

Costs orders immunity in the Federal Court and Federal Magistrates Court

26. Currently, persons claiming discrimination under the *Age Discrimination Act 2004* (Cth) (**AD Act**) are potentially liable for general costs orders should their claim progress from the Australian Human Rights Commission to the FC or FMC.
27. ELC proposes limiting costs orders that may be made against a person alleging discrimination under the AD Act in the FC or FMC, similar to the protections afforded to persons alleging discrimination under the EO Act or FW Act.

Increasing compensation that may be awarded

28. Currently, compensation under the EO Act, FW Act and *Industrial Relations Act 1979* (WA) (**IR Act**) is capped. As a result, an older worker who has completed a significant length of service prior to dismissal or discrimination may not have access to compensation adequately reflecting such service (and the difficulty of securing alternative employment) under EO Act, FW Act or IR Act.

29. ELC proposes increasing the compensation that may be awarded under the EO Act, FW Act and IR Act, to allow for adequate compensation of persons unfairly dismissed or discriminated against following a significant period of service.

Conclusion

30. ELC broadly supports law reform initiatives designed to prolong the participation of mature age workers in the paid workforce and to preserve choice and dignity for older workers.
31. ELC looks forward to further participation in the Grey Areas – Age Barriers to Work in Commonwealth Laws reform process through its anticipated response to the discussion paper to be released by the Australian Law Reform Commission later in 2012.