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From: Banks, Robin (DoJ)
Sent: Monday, 23 March 2015 12:50 PM
To: Goodwin, Vanessa (DPaC)
Cc: Bourne, Kristy (DPaC); Webster, Ginna (DoJ)
Subject: HPRM: Briefing note on the Public Health Amendment (Tobacco-Free Generation) Bill 2014
Attachments: 15.03.23-BN-AG re Smoke-free generation Bill.pdf

Dear Attorney

As discussed with Ms Bourne of your office, I am providing the attached advice for you to consider tabling in Parliament. I have done this because I have now had several enquiries from members of the Legislative Council about the impact of discrimination law on this legislative proposal and would prefer to ensure that all members get the same information from me on it.

I would be happy to discuss this with you if you have any questions or concerns.

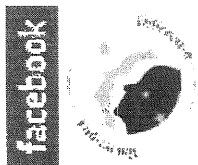
Regards

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23 March 2015

NOTED
SIGNED: 
DATED: 24/3/15

Briefing Note for the Attorney-General and Minister for Justice

The application of discrimination law to the Public Health Amendment (Tobacco-free Generation) Bill 2014

What the Bill is intended to do

The Public Health Amendment (Tobacco-free Generation) Bill 2014 (the Bill) will, if passed in its current form, amend the *Public Health Act 1997* by adding provisions that will make it unlawful:

- (a) to sell or offer to sell to a member of the tobacco-free generation any tobacco product: clause 4, adding section 67J(1);
- (b) for a licensed tobacco seller to permit a member of the tobacco-free generation to be sold, loaned, gifted or supplied with any tobacco product clause 4, adding section 67J(2);
- (c) for a person in charge of any premises from which tobacco products are sold to fail to provide specified information to persons employed at those premises clause 4, adding section 67J(5);
- (d) for a member of the tobacco-free generation to 'purport to provide' a person from whom they are trying to buy a tobacco product proof of age that the member knows or ought reasonably know is false clause 4, adding section 67K.

All of these provisions carry a penalty.

The term 'member of the tobacco-free generation' is defined to mean 'a person born on or after 1 January 2000'. That is:

Year	Smoke-free generation includes all persons aged less than
2015	15
2016	16
2017	17
2018	18
2019	19
2020	20
2021	21
2022	22
2023	23
2024	24
2025	25

Until 1 January 2018, the prohibitions set out in paragraphs (a), (b) and (c) above duplicate the existing prohibitions (and penalties) in relation to selling or supplying tobacco products to a child in the *Public Health Act*. This is because a child is defined in the *Public Health Act* as 'a person who has not attained the age of 18 years': section 64 of the *Public Health Act*.

Paragraph (d) above appears to be a new prohibition.

Discrimination in Tasmanian law

The *Anti-Discrimination Act 1998 (Tas)* (the ADA) makes it unlawful to discriminate (as defined in sections 14 and 15) on the basis of a range of 'prescribed attributes' (listed in section 16) in identified areas of activities (listed in section 22).

For the purposes of this briefing note, the following provision is relevant:

14. Direct discrimination

- (1) *Discrimination to which this Act applies is direct or indirect discrimination on the grounds of any prescribed attribute.*
- (2) *Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.*
- (3) *For direct discrimination to take place, it is not necessary –*
 - (a) *that the prescribed attribute be the sole or dominant ground for the unfavourable treatment;*
 - or

- (b) *that the person who discriminates regards the treatment as unfavourable; or*
 (c) *that the person who discriminates has any particular motive in discriminating.*

The relevant key elements to establish in relation to 'direct discrimination' are:

1. that there is less favourable treatment of a person;
2. that the person has a prescribed attribute; and
3. that the treatment was linked to that attribute.

The prescribed attributes listed in section 16 of the ADA relevantly include 'age': section 16(b).

To be unlawful, the discrimination must take place in connection with an area of activity. The areas of activity listed in section 22 of the ADA relevantly include 'the provision of ... goods': section 22(1)(c).

Without more, it is strongly arguable that a refusal to sell a product to a person based on their date of birth would be direct age discrimination in connection with the provision of goods in breach of the ADA. That the person selling the tobacco product felt it was in the purchaser's best interests for health or other reasons would not change this.

Exception for legislation

The ADA provides exceptions: see Part 5, Divisions 1–10.

Exceptions operate as defences to complaints of discrimination and any person seeking to rely on an exception in response to a complaint made against them must prove that the exception properly applies on the balance of probabilities: section 101.

Relevantly, the exceptions listed in Part 5, Division 1 include section 24. This exception states:

24. Actions required by law

A person may discriminate against another person if it is reasonably necessary to comply with –

- (a) *any law of this State ...; or*

...

Like all exceptions in the ADA, this exception does not automatically apply to protect against a complaint of discrimination. Rather, if a complaint were made of discrimination and the respondent to the complaint asserted that they did what they did because they were required to by a law, the respondent would have to prove, on the balance of probabilities, that what they did was 'reasonably necessary' under that other law.

Where the other law is broad and unspecific in what people are required to do and a person could comply with it in a non-discriminatory manner, it is likely that the exception would be found not to apply. Further, where a complaint called for that level of interpretation of the other

law and determination of facts, the Anti-Discrimination Commissioner is not empowered to determine if the exception properly applies. This means that any complaint made about an action related to that law would have to proceed to an inquiry conducted by the Anti-Discrimination Tribunal (unless the parties to the complaint agreed to resolve it through conciliation).

Some laws are, however, sufficiently specific to make proof of the exception relatively straightforward. That is, if the other law specifically states that a person must not do a particular thing and an effect of complying with that prohibition is discrimination, the person is likely to be able to prove on the balance of probabilities, that the discrimination was 'reasonably necessary' to comply with that other law. In that circumstance, the Anti-Discrimination Commissioner could properly reject or dismiss the complaint.

So, while a prohibition on selling tobacco products to persons on the basis of their age is, on its face, age discrimination, the exception in section 24 would apply where there is a law prohibiting sale of tobacco products to persons of that age or in that age group. As such, a person refusing to sell tobacco products to a person under the age of 18 in compliance with the current prohibitions found in section 64 of the *Public Health Act* (and to a person born after 1 January 2000 in compliance with the proposed prohibitions) would be able to rely on the exception in section 24. This is because those prohibitions are very clear and specific in nature and there is no way to comply with them in a way that doesn't discriminate based on age. Effectively, it becomes lawful age discrimination.

In conclusion, the Bill does not give rise to the possibility of unlawful age discrimination in breach of the *Anti-Discrimination Act 1998* (Tas).

Age discrimination in Federal law

Age discrimination is also unlawful under the *Age Discrimination Act 2004* (Cth), which applies to actions in Tasmania.

Section 14 of the *Age Discrimination Act* defines direct age discrimination in substantively the same way as the Tasmanian ADA. Direct age discrimination is unlawful in the provision of goods: section 28.

So, without more, it is strongly arguable that a refusal to sell a product to a person based on their date of birth would be direct discrimination on the basis of age in connection with the provision of goods in breach of the *Age Discrimination Act*.

Exception for legislation

Section 39 of the *Age Discrimination Act* provides a defence to unlawful discrimination if it is 'done in direct compliance with: (a) an Act of a State or Territory'.

Actions taken to comply with the current prohibitions on the sale of tobacco products under the *Public Health Act* or with the proposed provisions of the Bill would be likely to be protected on the basis that (a) those prohibitions are sufficiently clear and specific; and (b) there is no way to comply with them without engaging in age discrimination.

In conclusion, the Bill does not give rise to the possibility of unlawful age discrimination in breach of the *Age Discrimination Act 2004* (Cth).

International law

There may be international treaties to which Australia is a party (having ratified those treaties) that are relevant. These relevantly include, but are not limited to the *International Covenant on Civil and Political Rights* (the ICCPR) and the *WHO Framework Convention on Tobacco Control*.

The *WHO Framework Convention on Tobacco Control* (the *WHO Framework Convention*) sets out obligations on countries that have ratified it, including Australia. The following article may be relevant, although it may arguably only be relevant to supporting the current prohibition:

Article 16

Sales to and by minors

1. Each Party shall adopt and implement effective legislative, executive, administrative or other measures at the appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law or eighteen. These measures may include ...

I note, in addition, that Article 2 of this Convention does not prevent countries that have ratified it going further 'in order to better protect human health' or 'imposing stricter requirements that are consistent with [the Convention] provisions and are in accordance with international law:

Article 2

Relationship between this Convention and other agreements and legal instruments

1. In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.

The ICCPR is relevant to the extent that it specifies human rights that are to be promoted, protected and fulfilled by countries that have ratified it, including Australia. As such, it may be an 'international law' to be considered in relation to Article 2 of the *WHO Framework Convention*. There have been cases alleging bans on smoking constitute human rights breaches. As far as I have been able to ascertain these cases have challenged bans on smoking in closed facilities, such as prisons and forensic mental health wards. To date, most of these claims have been dismissed, but I note that they did not allege age discrimination but other types of discrimination and breaches of other human rights, such as privacy.¹

¹ The majority of the UK House of Lords found a ban in a secure mental health facility did not unreasonably restrict the human rights of patients in *R (on the application of G and others) v Nottinghamshire Healthcare NHS Trust and the Secretary of State for Health* [2009] EWCA Civ 795. In Canada, a ban on smoking in a forensic secure psychiatric unit was found not to breach the *Canadian Charter of Human Rights* in *Vaughn v Ontario* [2003] CanLII 42347.

There may be other international laws relevant to the Bill, but these are outside the scope of my expertise.

Unintended consequences

It is relevant to note that there has been a lot written about bans on smoking in closed facilities and the potential negative effects these may have on people needing to medical help in relation to mental illness.² These, however, raise different considerations as they ban smoking rather than the supply of tobacco products and they do so in circumstances where the person seeking to smoke is not free to obtain tobacco products through casual contact with others or permitted provision by family members or friends.

As the Bill does not prohibit a person (other than a licensed tobacco seller) giving cigarettes to a member of the smoke-free generation, it may not have a legislative impact for staff of closed facilities who are responsible for retaining a person's possessions and only giving them cigarettes on request.

Conclusion

The Bill, if passed, would not give rise to the possibility of successful complaints of unlawful age discrimination because of the effect of the exceptions found in section 24 of the *Anti-Discrimination Act 1998* (Tas) and section 39 of the *Age Discrimination Act 2004* (Cth).



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Copied to Ginna Webster, Deputy Secretary

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However, the New Zealand High Court held that a total ban on smoking in prisons breached the *Corrections Act*, which required sentences to be administered humanely: *Taylor v Attorney General & Ors* [2013] NZHC 1659. The Scottish Court of Sessions held that a ban on smoking in a closed mental health facility breached the human rights of the applicant. It noted that it was 'not endorsing the idea of a "human right to smoke"' and this only applied to the applicant's human rights, not those of others: *CM, Re Judicial Review* [2013] ScotCS CSOH_143 (27 August 2013).

² See, for example, Paul Kurdyak, John Cairney, Anna Sarnocinska-Hart, Russell C Callahan & Carol Strike, 'The Impact of a Smoking Cessation Policy on Visits to a Psychiatric Emergency Department' (2008) 53(11) *The Canadian Journal of Psychiatry* 779-782; and T Butler, R Richmond, J Belcher, K Wilhem and A Wodak, 'Should smoking be banned in prisons?' (2007) 16(5) *Tobacco Control* 291-293.