



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

Human rights never age

**Castan Centre for Human Rights Law
Annual Conference
'Human Rights 2012'**

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Australian Human Rights Commission

20 July 2012

I'd like to begin by acknowledging the traditional owners of the land on which we meet and pay my respects to their elders past and present.

My comments today focus on age discrimination in Australia.

Age discrimination is widespread in our community. Like other forms of illegal discrimination, it damages individuals and our society, and it violates human rights. My comments are based on the premise that we all have human rights. Those are the rights protected in the Universal Declaration of human rights 1948, and strengthened and expanded by the range of international rights conventions built on the foundation of the Declaration.

We all have these rights from the beginning of our lives, and on through to the end of our lives.

Those rights do not diminish with age. It is up to us to ensure that laws, policies, practices and community attitudes that currently diminish the rights of older people are addressed and changed, so that it becomes true in fact to say that human rights never age.

What is the age discrimination picture in Australia?

At the Australian Human Rights Commission we receive and deal with individual complaints that fall within the scope of the 4 anti-discrimination laws we administer and the international human rights conventions included in the AHRC Act 1986.

Most age discrimination complaints that we receive at the Commission are in the area of employment. During the 2010 – 2011 year, we received 175 complaints related to age, and approximately 70 per cent of these related to employment.¹

This single statistic alone demonstrates the significance of age discrimination in employment. Put together with a range of other indicators from ABS statistics and specific research it suggests that age discrimination in employment is the worst and most harmful manifestation of this form of illegal discrimination.

This is why employment is my priority as Age Discrimination Commissioner.

Age discrimination acts in two ways: it undermines older workers currently in jobs by excluding them from training and promotion, and by creating a hostile atmosphere that destroys their confidence, making them vulnerable to redundancies.

The second major effect is on older unemployed people trying to get back into the workforce. Recruitment processes are stacked against unemployed people from 45 up. Despite the existence of the *Age Discrimination Act 2004*, a directly discriminatory preference for young recruits is often stated. Even more often code words like “energetic”, “dynamic”, “innovative” are used to shut the door in the face of older workers, people with extensive relevant skills and experience and a proven track record.

ABS statistics show unemployed Australians aged over 45 reported that the main difficulty in finding work (accounting for 18 per cent of cases) was that they were “considered too old by employers”.²

A study by the Financial Services Council reported 35 percent of workers aged 50 and older earning between \$40,000 and \$80,000 saying that they felt discriminated against because of their age.³

The most common form of discrimination according to the FSC was being made redundant or laid off before others.⁴ This view was backed up by the responses from employers, who noted that this was by far the most common form of discrimination.⁵

Older workers also highlighted a lack of training opportunities, verbal abuse and inflexibility towards health and physical needs.⁶

The extent of this discrimination needs to be acknowledged more widely.

Not only does long term, often permanent unemployment for older people create massive financial and personal problems for affected individuals, the wasting of a large cohort of otherwise positive contributors to our economy builds up a massive cost for the public purse.

National Seniors research found nearly two million older Australians are willing to work, could be encouraged to work, or are unemployed and looking for work.⁷ National seniors also found that more than 200,000 people over 55 would take up jobs tomorrow if they were able, and cost of this wastage to the economy is estimated at \$10.8 billion per year.⁸

It not only costs the public purse, it weakens economy by holding back growth. Business growth requires what these people have to offer.

A recent report by Deloitte Access Economics entitled: *Where is your next worker* argues that the problem in Australia in coming years won't be a lack of jobs – it will be a lack of workers. Deloitte reports that the population aged 55-70 is a massive untapped source of productive capacity

What are the protections against age discrimination?

In Australia there are a number of institutions that can receive age discrimination complaints. There are Equal Opportunity Commissions in each state and territory, and two federal bodies: the Fair Work Commission and the Australian Human Rights Commission. People have a choice about where they will take their complaint.

The Australian Human Rights Commission has obligations to administer the *Age Discrimination Act 2004* with protections in the areas of:

- employment
- education
- access to premises
- provision of goods and services
- disposal of land
- Commonwealth laws and programs; and
- requests for information

The primary purposes of the Act are to:

- raise awareness that people of all ages have the same fundamental rights to equality before the law
- eliminate unlawful age discrimination within our community
- respond to 'demographic change by removing barriers to older people participating in society; and
- change negative stereotypes about older people

In 2011 the Act was amended to include a dedicated Age Discrimination Commissioner and I took up that position last year.

How do we define age discrimination in employment in human rights terms?

The Australian Government also has human rights obligations in relation to age. While we don't have an age specific Convention under the UN system, certain age obligations are contained in other conventions. They require governments to:

- ensure that older people are protected from poverty through the provision of social security income;⁹ and
- ensure that there are employment, career guidance and training options for older workers.¹⁰

Forced to work longer?

While it is fair to say that governments over recent years, particularly since the passage of the Age Discrimination Act 2004, have acknowledged the need to remove age discrimination and introduced a range of policies designed to improve fairness and equity, other policies remain that work against these objectives.

Take the decision to increase the qualifying age for the Age Pension. With this decision the Australian Government has created an incentive or perhaps more accurately, *an imperative* for Australians to remain in the workforce to age 67. The measure is due to be in full effect in 2023.¹¹ The change was broadly supported, but it did not lead to systematic review of other policies that bar people working over 65, which they will now need to do to reach the age pension.

Currently, around 80 per cent of retired Australians rely on the Age Pension to some degree, so we are looking at a necessary and very large increase of people aged 65 to 67 in the labour market at a time when the evidence shows that over 65's seeking work come up against a range of barriers.

The removal of these barriers falls to a large extent, though not entirely to government and public policy. Despite a range of positive measures there remain significant gaps in the way public policy supports older workers continuing to work.

Some of the factors that might be pushing people out of work prematurely are the limits on workers compensation, income insurance, superannuation, and some driver's license requirements.

I have recently launched a paper entitled: *Working past our 60s: Reforming laws and policies for the older worker*. This paper looks at the barriers to workforce

participation after the mid-60s – specifically government and industry age limits or age caps that reduce or withdraw the entitlements of older workers.

Workers compensation

Let's look at workers compensation. In most jurisdictions, the age at which the income replacement part of worker's comp is cut off or limited is 65. If injured at work, older workers are covered for medical expenses, but not the income replacement aspect.

Why the age cut off? Is it more costly for insurance for the older worker? I am yet to see any data to justify the worker's comp age limits, any data indicating that older people are more prone to workplace accidents. In fact, some of the evidence suggests the contrary.

The ABS *Work Related Injuries* report found that people aged 65 years and over recorded the **lowest rate** of work-related injuries and illnesses of all age groups with 30 per 1,000 people.¹² The highest rates of work-related injury or illness were in the 45 to 49 year age group at 72 per 1,000 people.¹³

On the basis of such evidence, it is hard to see the rationale to keep the age bar at 65.

Queensland and Western Australia don't have an age limit on worker's comp. Instead they have capped limits on the period or the amount that the schemes will pay. If two states can lift these age bars, why can't the others?

Income protection insurance

And there is no joy for older workers who want to protect themselves through income protection insurance. Along with worker's comp, income insurance cuts out in the early to mid-60s, with some exceptions where coverage is provided to 70.

The trades industries tend to impose a younger cut-off point at 60 with some exceptions.¹⁴

Under the Age Discrimination Act, it is possible to deny income insurance on the basis of *actuarial or statistical data on which it is reasonable for the discriminator to rely...*¹⁵

Licensing requirements for professional drivers

A further problem for older workers can be the restrictions and obligations that are imposed on older drivers. This can be for drivers of private vehicles and for drivers of commercial vehicles.

Most State and Territory motor registration authorities mandate medical tests and competency tests for older drivers. These tests vary widely from jurisdiction to jurisdiction. From representations I receive, it appears that some of these sets of

rules have the effect of disqualifying capable drivers, thus rendering them unable to earn a living.

While I accept and promote the prime importance of safety on the road, equally, I propose we revisit arbitrary and inconsistent testing for people once they reach a particular age. What I am advocating is a nationally consistent approach to driving licence requirements where the key is capacity, rather than age.

In a human rights context it is important to keep willing older people in work. The right to work is fundamental, and while we are willing and able to work, that right should not be affected by age alone. Failure to protect that right for older people exposes them to other rights violations, including loss of adequate income, health, and secure housing.

As well as our individual rights, it is clear that the health of our national economy, and its capacity to provide for the basic rights of all of us, depends on making more productive use of older people.

You may have heard this statistic before – but it's worth repeating: we currently have 5 workers for every person over the age of 65 – that's workers who pay tax to provide revenue for the age pension, our health and education systems etc. However, without radical change, the number of workers for each person over 65 is predicted to decline to 2.7 workers by 2050.¹⁶ If this situation does eventuate, it will have serious negative implications for tax revenue and for a cohesive, fair society.

To protect our civil society, as well as to protect the rights of older people, we need a significant extension to the length of the average working life.

Who is addressing age discrimination in the workforce?

Some important activities are now underway.

A project of *Safe Work Australia* will encourage the states and territories to harmonise aspects of the worker's compensation legislation.

There is continuing support, including from the federal government for the work of the Insurance Reform Advisory Group (IRAG) to examine insurance issues with industry and stakeholders.

In terms of law reform, two major current initiatives have the potential to lead to stronger protection of the rights of older people:

1. First, the *Australian Law Reform Commission* Review of Commonwealth legislation that prevents people over 45 from staying in the workforce should establish the case for extensive policy and law reform in this area.
2. Secondly there is the Attorney-General's project to consolidate the five anti-discrimination Acts into a single law; this initiative holds great potential for improvement in all aspects of anti discrimination law and human rights protection including the rights of older people.

The Australian Law Reform Commission's (ALRC) inquiry into Commonwealth laws that discriminate on the basis of age, called the *Age Barriers Inquiry* is underway. I have been appointed a part-time Commissioner to this Inquiry.

The Inquiry has been asked to look at: superannuation law; family assistance, child support; social security law; employment law; insurance law; compensation laws; and any other relevant Commonwealth legislation exempt under the *Age Discrimination Act 2004* (Cth). Mature age is defined as being over 45 years.

The Age Barriers Inquiry released an Issues Paper at the end of April *Grey Areas: Age Barriers to Work in Commonwealth Laws*. They have received over 50 submissions and completed 56 consultations throughout Australia.

A second discussion paper will be released mid-September with submissions to this due in November. Then there will be another wide consultation round before development of final law reform recommendations and a Report in April 2013.

Consolidation of Five Anti-Discrimination Acts

The Australian Government is currently looking to consolidate the 5 federal anti-discrimination laws into a single law that also extends protections to people on the grounds of sexual orientation and gender identity. This is referred to as the harmonisation or consolidation project.

The Attorney-General's Department is developing an exposure draft of the legislation and I expect we will see this soon.

In our Commission's submission to the Consolidation of Laws Inquiry, we recommended that there should be **no** reduction in the level of protection currently provided by the existing five laws.

We further recommended that the beneficial and best practice features of existing anti-discrimination legislation should not only be maintained, but as far as possible applied to other grounds of discrimination. In other words, the gold standard of discrimination protections should be applied in the new consolidated law.

We argued for consistency between Commonwealth discrimination law and the non-discrimination provisions of the *Fair Work Act*, and between Commonwealth discrimination law and areas of best practice in State and Territory anti-discrimination and equal opportunity laws.

We also argued for a reduction in the number of exemptions in the Acts and for exemptions to be more narrowly confined.

A simplified and consolidated anti-discrimination law which specifies protected attributes is likely to clarify our understanding of discrimination across the community, and potentially simplify the system for respondents and complainants.

One of the reasons why it will simplify discrimination protections is because much discrimination is intersectional – in other words, the discrimination may include a combination of sex, age, race, or disability discrimination.

The current different discrimination laws make it difficult for complainants to know how best to find redress - is it age discrimination, gender or disability discrimination? Measures to strengthen anti-discrimination laws into a single law make it simpler to understand that age, sex, race, and disability discrimination are all unlawful.

Our submission pointed out that the elimination of discrimination brings economic benefits. For example, in the case of gender, independent estimates indicate that closing the gender participation gap in employment would increase Australian GDP by 21%.¹⁷.

I have commissioned similar research in age and workforce participation – to establish the benefits to the economy that would flow from greater participation of older people in the workforce. This research will show the economic benefit to Australia's economy if we were placed first amongst OECD countries in the employment of people aged 55 to 64. At present we rate eighth out of the 34 OECD countries. Currently, just over 60 percent of 55 to 64 year olds are in the workforce in Australia.

Because of age discrimination and other barriers the participation rate drops off dramatically after that point, at huge loss to the national economy.

The extent and severity of age discrimination will I hope be reduced by reform measures arising from the ALRC age barriers review and from the consolidation of antidiscrimination laws project.

The economic and business imperatives to remove age discriminatory practices are very strong. I am currently engaged in national, local and sectoral discussions to promote the business case for extending our average working life, and I am hoping this will lead to immediate and extensive changes in recruitment and employment policies.

Conclusion

As well as law reform, more needs to be done, by government, by employers and by the community generally.

To accommodate a vastly changing demographic in this country we need to change the 'too old to work' culture.

We need to reset our sights on the real future; the future where most of us will live into our 80's and beyond, and will be healthy and able for most of those years. The research shows us this is the real future.

It is happening right now, but community attitudes and labour market values too often seem stuck back in the early 20th century, when most people died before they reached pension age.

We need to remove the de-facto retirement markers – the policies and laws that discriminate against older workers. As a bottom line, we should all have access to rehabilitation if we are injured, we should all have access to workplace training and career advice, and we should all be able to insure our income so we receive weekly payments if we become sick or injured during our working lives.

These are essential for the individual worker but they are also essential to a well-functioning society and economy.

Our human rights obligations require that governments must act to prevent poverty amongst older Australians.

Currently, two-thirds of retirees rely on the Age Pension as their main source of income.¹⁸ For these people, poverty is never far away. Many are already afflicted with it, and homelessness among older women and men is growing.

The best way to avoid poverty is to stay in work longer. If we keep working while we are fit and able we have more superannuation savings and can pay off the family home. These are protective factors against poverty.

We must be able to make choices about how we live and work as we age - without discrimination, without the negative stereotypes of the older worker, and without the barriers that reduce our entitlements in the workplace.

Our commitments as a nation to the major international human rights conventions require no less. In defeating age discrimination we will not only advance the exercise of basic human rights of older Australians, we also enrich our society and grow our economy.

Thank you.

¹ Australian Human Rights Commission Annual Report 2010 – 2011 At: http://www.humanrights.gov.au/about/publications/annual_reports/2010_2011/index.html (viewed 12 June 2012).

² ABS, Older People and the Labour Market, 4102.0 – Australian Social trends, Sep 2010. At: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features30Sep+2010> (viewed 27 January 2012)

³ Ratesonline Insurance At: <http://www.ratesonline.com.au/insurance/income-protection> (viewed 8 February 2012).

⁴ Westfield and Wright, *Attitudes to Older Workers – prepared for the Financial Services Council*, January 2012, p 13. At: http://www.fsc.org.au/downloads/file/ResearchReportsFile/2012_3001_olderworkers_report.pdf (viewed 12 June 2012).

⁵ Westfield and Wright, *Attitudes to Older Workers – prepared for the Financial Services Council*, January 2012, p 13. At: http://www.fsc.org.au/downloads/file/ResearchReportsFile/2012_3001_olderworkers_report.pdf (viewed 12 June 2012).

⁶ Westfield and Wright, *Attitudes to Older Workers – prepared for the Financial Services Council*, January 2012, p 13. At: http://www.fsc.org.au/downloads/file/ResearchReportsFile/2012_3001_olderworkers_report.pdf (viewed 12 June 2012).

⁷ National Seniors Australia, *Still Putting In, Measuring the Economic and Social Contributions of Older Australians*, May 2009. At www.productiveageing.com.au/userfiles/file/StillPuttingIn.pdf (viewed 9 July 2012).

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- ⁸ National Seniors Australia, *Still Putting In, Measuring the Economic and Social Contributions of Older Australians*, May 2009. At www.productiveageing.com.au/userfiles/file/StillPuttingIn.pdf (viewed 9 July 2012). Note: National Seniors Australia economic assumptions are based on a per capita GDP contribution of \$53,523 per person. See also, National Seniors Australia, 'Chart of Accounts': A framework for measuring the economic and social contributions by older Australians, 2009, p.20. At http://www.productiveageing.com.au/site/grants_arc.php (viewed 9 July 2012).
- ⁹ The Universal Declaration of Human Rights 1948, art 25 (1)
- ¹⁰ Human Resources Development Convention C142, 1975, art(s) 1,2,3.
- ¹¹ Australian Bureau of Statistics, *Life Expectancy Trends*, 4102.0 - Australian Social Trends, March 2011. At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10Mar+2011> (viewed 21 September 2011).
- ¹² Australian Bureau of Statistics, *6324.0 - Work-Related Injuries, Australia, 2009-10*, 2010. At http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6324.0Main_per_cent20Features32009-10?opendocument&tabname=Summary&prodno=6324.0&issue=2009-10&num=&view= (viewed 1 November 2010).
- ¹³ Australian Bureau of Statistics, *Work-related injury or illness down, men still at most risk*, 6324.0 - Work-Related Injuries, Australia, 2009-10. (Media Release, 13 December 2010). At http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6324.0Media_per_cent20Release12009-10?opendocument&tabname=Summary&prodno=6324.0&issue=2009-10&num=&view= (viewed 1 November 2011).
- ¹⁴ Trades Recognition Australia, *Australian Recognised Trade Certificate Criteria and Guidelines*, (2011). At: <http://www.deewr.gov.au/Skills/Programs/SkillsAssess/TRA/ARTC/Pages/home.aspx> (viewed 26 September 2011).
- ¹⁵ *Age Discrimination Act 2004* (Cth) ss 37(1), (2), (3).
- ¹⁶ The Treasury, *The 2010 Intergenerational Report, Chapter 1: Long-term demographic and economic projections*, 2010, Australian Government. At http://archive.treasury.gov.au/igr/igr2010/report/html/02_Chapter_1_Economic_and_demographic.asp (viewed 17 May 2012).
- ¹⁷ Goldman Sachs, JBWere, Goldman Sachs and JBWere, *Australia's Hidden Resource: The Economic Case for Increasing Female Participation*, 30 November 2009.
- ¹⁸ Australian Bureau of Statistics, *Retirement and Retirement Intentions*, 4102.0 - Australian Social Trends, March 2009. At: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features50March%202009> (viewed 9 December 2011).