Willing to Work: National Inquiry into Employment Discrimination against Older Australians

Submission by the Anti-Discrimination Commissioner (Tas)

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# Introduction

Thank you for the opportunity to make a submission to the Australian Human Rights Commission’s inquiry in age and employment.

The following provides information on the situation within Tasmania and includes a summary of complaints received by me in relation to this issue.

I would be happy to elaborate on these issues should you wish me to do so.

Robin Banks

Anti-Discrimination Commissioner (Tas)

# Background

## The Tasmanian situation

Tasmania’s population is the oldest of all states and territories and is also ageing at the fastest rate. As of 2012, Tasmania had the largest proportional share of people aged 65 years and over. In addition, the number of people aged 85 years and over is growing rapidly.[[1]](#footnote-1)

It is estimated that by the year 2030 one in four Tasmanians will be aged 65-plus and by 2042 almost one-third of our population will be aged 65 years or older.[[2]](#footnote-2)

Importantly, data shows labour force participation rates in Tasmania sharply decline after 55 years of age and remain lower than nationally for all age groups over 45 years.[[3]](#footnote-3)

Whilst declines in workforce participation for older Tasmanians are, in part, reflective of the number of people wanting to permanently exit the workforce once they reach an age at which they can access other income streams such as superannuation, there are also many who remain outside of the workforce because of difficulties in finding work or retaining work.

It is clear that older Tasmanians experience high rates of discrimination in employment, including being turned down for positions, on the basis of their age.

Addressing the low workforce participation rates of older Tasmanians will become increasingly important as changes to the Age Pension qualifying age are introduced because those changes will have a disproportionate impact on people within Tasmania.[[4]](#footnote-4)

The risk of poor attachment to the workforce as Tasmanians age includes increased rates of poverty and financial hardship. Data sourced from the 2011 census indicated approximately 64% of Tasmanians aged 65+ live under the poverty line of $400 per week. This compares with approximately 30% of all Tasmanians who live on or below the poverty line.[[5]](#footnote-5) At the same time, Tasmania has a disproportionately high number of older people living in households reliant on government pensions as their main source of income (21% of Tasmanians aged 55–64 years; 66% of Tasmanians aged 65–74 years; and 81% of Tasmanians aged 75+ years).[[6]](#footnote-6)

While the rationale for changing the eligibility criteria for the Age Pension relates principally to increases in life expectancy, unless barriers to employment (including age discrimination) are addressed, many people beyond their mid-fifties will find it difficult to retain or gain employment and will be reduced to living off lower levels of income support.

It is critical, therefore, that factors preventing older Tasmanians remaining in the workforce are addressed.

Barriers include reduced access to training or other opportunities to develop new skills where a change of industry or work is required; discrimination in recruitment processes and attitudes of employers; and structural barriers such as access to worker’s compensation insurance or income protection insurance.

## Inclusive Ageing Strategy

To assist in addressing issues arising from the ageing of the Tasmanian population the Tasmanian Government has developed a comprehensive baseline profile of older Tasmanians.

*Facing the Future* provides data regarding the position of older Tasmanians, including information regarding access to employment.[[7]](#footnote-7)

The information provided an important underpinning for the Tasmanian Government’s *Inclusive Ageing: Tasmania 2012–2014 Strategy* released in August 2012, which aimed to increase the capacity of older Tasmanians to be fully included in community life.[[8]](#footnote-8)

# Barriers to remaining in the workforce

1. What policies, workplace practices, programs or incentives assist with increasing participation of older workers? How adequate are these policies, practices and incentives? What is the role of government, peak business and employee groups, and individual employers?

2. Are there distinct challenges faced by different sized businesses and organisations, sectors and industries in employing older workers?

Engaging in fulfilling work that aligns with skills, experience and interests improves social connectedness and contributes towards greater economic independence for older workers.

In practice, however, many older workers are excluded from the workforce. This may occur for a range of reasons. They may have care responsibilities or they may lack up-to-date skills and experience or be in ill health. At the same time, employers may not be willing to provide the sort of flexible work arrangements that many older workers need or want.

Australian Bureau of Statistics figures indicate that the age of persons exiting the workforce in 2012–13 because they had reached retirement age and were eligible for superannuation and/or a pension (62.8 years) was considerably older than:

* those who exited the workforce due to retrenchment or dismissal from employment or because there was no work available (57.1 years);
* those ceasing employment because of lack of access to satisfactory work arrangements/part-time work (57.4 years);
* those ceasing work because of the need to undertake caring responsibilities (56.8 years); and
* those who left because of sickness, injury or disability (54.9 years).[[9]](#footnote-9)

Addressing the reasons people exit the workforce early is therefore likely to result in many older workers remaining in employment for longer periods.

The following examines some of these issues in more detail.

## Workplace redundancy and renewal arrangements

Pressure on older workers to exit the workforce is often increased during periods of economic downturn and industry restructure.

In Tasmania, for example, the State public sector has undergone significant downsizing to achieve targeted savings.

As at the end of March 2015, the general Tasmanian government full-time equivalent positions were 766 fewer than at the start of the 2014–15 financial year.[[10]](#footnote-10)

Whilst the reductions applied across the whole of the public sector, concern has been expressed about targeting redundancies at older workers.

The Tasmanian Government’s Workforce Renewal Incentive Program (WRIP), for example, is an incentive program to encourage employees to leave the State Service to enable opportunities for agencies to re-profile and re-classify positions.[[11]](#footnote-11) The program is used explicitly to target the recruitment of young people and graduates at a lower classification point. In excess of 550 workers exited the State government workforce between July 2014 and 30 March 2015 under the scheme.

Concerns have been expressed about the age and gender bias of the WRIP program, both in terms of the employees being targeted by the scheme and inconsistencies in the way in which guidelines are being applied across Government agencies. In July 2015, the Tasmania’s Auditor-General announced he would examine the program and my office has offered assistance in reviewing any discriminatory impacts of the program. [[12]](#footnote-12)

The impact of internal migration and net overseas migration aside, Tasmania is set to experience very low (and in some years negative) labour supply growth over the coming decades.[[13]](#footnote-13) Among other factors, this will lead to an ageing of the labour supply and associated decline in the availability of younger workers (15–64 years). The impact of these changes will highlight the importance of increasing the participation of mature-age Tasmanians in the labour force. Currently Tasmania is underperforming in terms of mature-age participation in the labour force and, together with the restrictions on future labour supply, these trends highlight the importance of facilitating continued involvement in the workforce by mature-age people rather than increasing the rates at which they are being encouraged to leave.[[14]](#footnote-14)

## Impact of low attachment

Whilst there are many reasons why older people leave the workforce, of particular concern is the impact of low attachment to the workforce among discouraged job seekers. Discouraged job seekers are those who are available for work, but are not looking because they don’t think they will be able to find a job.

In September 2015, around 10% of people aged 55 years and over reported being under-utilised in the workforce, either because they were unemployed or wanted to work more hours.[[15]](#footnote-15)

The National Prevalence Survey indicates that around one third of older people have given up looking for work as a result of experiencing age discrimination.[[16]](#footnote-16) Around three-quarters of discouraged job-seekers aged 65 years and older reported the main reason they were not actively looking for work was because they were considered too old by employers.[[17]](#footnote-17)

One of the main areas of discrimination against older workers exists in recruitment, particularly in relation to those who are seeking to re-enter the workforce.

National Seniors Australia estimates Australian workers who lose their job at age 55 require 72 weeks to find alternative employment, compared with an average of 45 weeks for younger job seekers.[[18]](#footnote-18)

Complaints received by Equal Opportunity Tasmania (summarised in the following section) confirm a significant concern for older Tasmanians is that they are or perceive they are being discriminated against in the recruitment process on the basis of their age.

This is a view shared by the Australian Law Reform Commission in its *Access All Ages* report, which identified discrimination against mature-aged job seekers by some recruitment agencies and a limited understanding of obligations under discrimination law as key barriers to the recruitment of mature aged job seekers.[[19]](#footnote-19)

To ensure compliance with legal obligations under both industrial and discrimination law, it is important employers and employment agencies have a good understanding their legal obligations and that action is taken to improve recruitment practices and facilitate broad cultural and attitudinal change across all industry sectors. This includes the requirement to avoid the inclusion of discriminatory selection criteria when advertising positions and to set in place best-practice, inclusive selection procedures to ensure suitability assessments are not based on discriminatory presumptions or the perceived ability of a work seeker to undertake the role or position because of their age.

## Managing an ageing workforce

A key underlying theme in much of what amounts to age discrimination is the use of age as an indicator of ‘risk’. Generalisations are made about age informed by stereotypes about a person’s level of ability at certain ages.

Widespread views continue to exist that older workers lack flexibility and are less receptive to taking up new skills or are less reliable for health reasons. This is despite the fact that older workers are often more productive and loyal to their present employer than workers in other age cohorts and, in general, suffer fewer workplace injuries than younger workers.

To assist in countering these stereotypes, WorkCover Tasmania has released a publication aimed at shifting perceptions about older workers.[[20]](#footnote-20)

*Safe and Healthy: a guide to managing an ageing workforce* has been adapted from a similar publication produced by the Government of Alberta in Canada. It provides information on changes that can be made in the workplace to keep ageing workers safe, healthy and productive.

Key strategies include providing greater flexibility in the workplace; enhanced education and health strategies for older workers; and improved procedures to enhance the health and safety of older workers.

## Access to flexible working arrangements

A critical aspect of retaining older workers in employment for longer periods is the provision of flexible work arrangements.

As indicated earlier in this submission, the average age of persons exiting the workforce is considerably reduced for those who are unable to find satisfactory work arrangements (such as part-time work) or who have increased caring responsibilities.

Working conditions conducive to enabling older workers balance their work-life responsibilities provide increased incentive for older workers to stay in the workforce and remain economically productive into their older years.

Access to flexible working arrangements, including the ability to work part-time, is a significant issue for older workers. Inclusion of provisions in the *Fair Work Act 2009* (Cth) (FWA) to extend the right to request flexible working arrangements to older workers (55+) and/or workers with caring responsibilities are critical to maintaining older persons within the workforce.[[21]](#footnote-21)

However, the level of awareness among older workers of their employment rights appears low and nor does there appear to be widespread understanding among employers or their obligations under the FWA.

A significant issues addressed by the Australian Law Reform Commission in its *Access all Ages* report was the need for greater awareness of legal rights and obligations, including promoting flexible working arrangements as standard business practice[[22]](#footnote-22) and the inclusion of review provisions in the FWA to enable those who are refused access to flexible work arrangements to have that refusal reviewed.[[23]](#footnote-23) This approach is strongly supported.

## Access to worker’s compensation

The average age at which at person exits the workforce due to injury, sickness or disability is almost 8 years younger (54.9 years) than for those people who exit because they have reached retirement age and are eligible for superannuation and/or a pension (62.8 years). As changes to the pension age and superannuation eligibility criteria flow on to existing workers it is expected the average age at which a person exits the workforce due to reaching retirement age will increase, thereby increasing the gap with those who are forced to depart early from the workforce due to injury, sickness or disability.

Whilst for some people sustaining an injury, sickness or illness leaves them with little option other than to permanently retire from the workforce, for many others it is apparent barriers to accessing worker’s compensation and/or income protection insurance are encouraging early exit.

State- and territory-based worker’s compensation schemes generally provide employees aged over 65 years with little or no protection in relation to the costs of work-related injuries. Typically, injured workers cannot get weekly compensation after they reach retirement age. This has the effect of transferring older workers from employment on to a retirement pension.

Under Tasmania’s *Workers’ Rehabilitation and Compensation Act 1988*, for example, if an injury occurs on or before age 64, compensation ceases at 65 years. If the injury occurs after 64, compensation ceases one year after the injury occurs. The Workers Rehabilitation and Compensation Tribunal may allow payments to continue where the worker would have continued to work beyond age 65 (section 87), however the decision to do so is discretionary.[[24]](#footnote-24)

## Access to insurance

Income protection insurance—otherwise known as personal accident, sickness and disability insurance—protects the insured in the event of being unable to work due to sickness or injury. The benefit is generally provided by way of a wage subsidy when the policy holder is unable work due to circumstances covered by the policy.

Many self-employed older workers are unable to get income protection insurance over 65 years of age leaving them unable to work or forcing them to work with no cover. Similar age restrictions are also found in relation to trade insurance for accident and illness protection. Where coverage is available, premiums are prohibitive.

This barrier to employment is particularly difficult for those exiting a job who are unable to find new employment and choose instead to become self-employed.

A similar problem exists when it comes to mature-age volunteers. In May 2013, I published an extensive report into discrimination in the provision of personal injury insurance covering older volunteers.[[25]](#footnote-25) The Report examined the practice of many insurance companies adopting age limits for the provision of personal injury insurance to volunteers and the inclusion of restrictions that prevent people in particular age groups from accessing the same benefits as others.

As volunteering remains a significant area of employment of older Australians and often forms an important pathway to paid employment, ongoing restrictions in the access to insurance coverage remain an area of significant concern. A key recommendation arising from this report was that the insurance industry develops an Insurance Industry Anti-discrimination Compliance Code aimed at providing clarification of the way in which insurance exceptions in discrimination law should apply.[[26]](#footnote-26) It is my view that it is urgent that action be taken to address these concerns.

# Data

3. What other data or information is available on employment discrimination against older Australians?

Tasmania’s discrimination law provides legal protection against age discrimination in employment.

The following provides an overview of enquiries and complaints related to age discrimination received under the Act over the past three financial years.

## Age discrimination enquiry data

Enquiry data for Tasmania shows that approximately half of all enquiries received about age discrimination relate to the area of employment including discrimination in relation to recruitment; discrimination against older workers within the workplace; and differential treatment of older workers in relation to redundancy and employment termination.

It is also of note that the number of enquiries in relation to age discrimination significantly increased in the 2014–15 financial year. While the reason for this increase is not clear, it may relate in part to increased concern about access to employment and job security at a time of significant labour force contraction, particularly in the Tasmanian public sector which represents the State’s biggest employer.

Table 1: Age discrimination enquiries[[27]](#footnote-27)

|  | 2012–13 | 2013–14 | 2014–15 |
| --- | --- | --- | --- |
| Enquiries received about age discrimination | 40 | 40 | 65 |
| Enquiries received about age discrimination in area of employment  | 20 | 20 | 31 |
| **Enquiries received about age discrimination in the area of employment: Contact mode** |
| Telephone | 18 | 13 | 22 |
| In person | 1 | 3 | 4 |
| Electronic (e-mail, web etc.) | 1 | 4 | 5 |
| By post | 0 | 0 | 0 |
| NRS | 0 | 0 | 0 |
| TTY | 0 | 0 | 0 |

## Age discrimination complaint data

Table 2 provides information on complaints related to age discrimination received since July 2012.

Whilst the number of age-related complaints vary, the proportion of age-related complaints received annually has exceeded 11 per cent of all complaints over the past decade, peaking at a high of 24.2% of all complaints in 2008–09.[[28]](#footnote-28) Consistent with broader complaints data, employment represents the most significant area of activity identified by complainants.[[29]](#footnote-29)

Table 2: Age Discrimination Complaints (from people aged 40 years and over)

|   | 2012–13 | 2013–14 | 2014–15 |
| --- | --- | --- | --- |
| Total number of complaints received about age discrimination | 21 | 22 | 17 |
| Percentage of all complaints | 13.2% | 12.2% | 12.0% |
| Number of complaints received about age discrimination from people aged 40 years and over | 12 | 17 | 16 |
| Number of complaints received from people aged 40 years and over about age discrimination in the area of employment | 9 | 6 | 7 |
| **In relation to complaints received from people aged 40 years and over about age discrimination in employment: the stage of employment the complaint related to** |
| While looking for employment | 2 | 2 | 0 |
| During employment | 6 | 3 | 5 |
| End of employment/Termination | 3 | 3 | 2 |
| Number of complaints about age discrimination in employment finalised in period | 8 | 7 | 8 |
| **Outcomes of complaints about age discrimination in employment finalised in period** |
| Conciliated | 4 | 3 | 6 |
| Terminated - No reasonable prospect of conciliation/Referred to tribunal | 0 | 1 | 1 |
| Terminated/Dismissed - other grounds such as no substance | 3 | 3 | 1 |
| Withdrawn | 1 | 0 | 0 |
| Deemed does not wish to pursue/lost contact | 0 | 0 | 0 |

The nature of the complaints received reflects the findings outlined in earlier sections:

J applied for a job as a sales consultant and was asked for his age in the online application form. J is 55 years of age and was therefore listed as being in the 51–60 year old age bracket. He was not successful in gaining employment and believed this was because of his age.

G had worked in a casual support worker position for a number of years. She applied for a range of permanent vacancies, but was unsuccessful. All successful applicants were under the age of 25 years. G is 56 years of age.

Q was asked during a job interview about her date of birth and whether she had children. She sent an e-mail after the interview expressing her concern about the questions. She was unsuccessful in gaining employment.

A was questioned during a pre-employment meeting about taking the risk of starting a new job at his age.

S flew to Hobart from interstate for an interview for a position in a call centre. He was unsuccessful and considered this was because of his age.

B had been employed for 18 years with the same firm. He believes the decision to make his position redundant was made by a new and considerably younger manager and that he lost his position in circumstances where younger and less experienced staff were retained.

W believes his application for an adult apprenticeship was not accepted because he was too old.

H was not successful in his application for a position in a biotechnology company. In an e-mail explaining why he was not successful, the CEO of the company told his it was because of his age as they wanted to ‘inject some youth’.

W alleged her employer failed to assist in making workplace adjustments to her duties because of perceptions about her age. She believed her employer was also forcing other employees into early retirement by assigning them tasks that were outside of their skill set.

## Complainant demographics

Table 3 provides information on the demographic profile of age-related employment complainants for the last three financial years.

Whilst the data shows the gender of those making complaints is relatively evenly spread, there were few age-related employment complaints received from those of culturally or linguistically diverse or Aboriginal background. Data does, however, indicate that disability is a factor in a significant number of complaints. The age at which most age-related employment complaints are received is in the 50–59 year old age bracket.

Table 3: Complainant Demographics

|  | 2012–13 | 2013–14 | 2014–15 |
| --- | --- | --- | --- |
| **Gender** |
| Female | 3 | 3 | 3 |
| Male | 6 | 3 | 4 |
| X (Indeterminate/intersex/unspecified) |   |   |   |
| Unknown |   |   |   |
| **Disability** |
| Yes | 2 | 1 | 4 |
| No |   |   |   |
| Unknown |   |   |   |
| **Country of birth** |
| Born in Australia | 9 | 6 | 7 |
| Born outside Australia |   |   |   |
| Unknown |   |   |   |
| **How well does the person speak English?** |
| Not at all |  |  |  |
| Not well |  |  |  |
| Well |  |  |  |
| Very well |  |  |  |
| Unknown |  |  |  |
| **Aboriginal or Torres Strait Islander descent** |
| Aboriginal | 1 |  |  |
| Torres Strait Islander |  |  |  |
| Both |  |  |  |
| No | 8 | 6 | 7 |
| Unknown |  |  |  |
| **Age group** |
| 40-49 | 0 | 0 | 3 |
| 50-59 | 6 | 4 | 3 |
| 60-65 | 1 | 2 | 0 |
| 66-75 | 2 | 0 | 1 |
| 75+ | 0 | 0 | 0 |
| Unknown | 0 | 0 | 0 |
| **Employment status** |
| Full-time | 3 | 3 | 2 |
| Part-time | 0 | 0 | 0 |
| Contract | 0 | 0 | 0 |
| Casual | 3 |   | 3 |
| Unemployed | 2 | 2 | 1 |
| Unknown | 1 | 1 | 1 |

## Respondent demographics

Table 4 provides a breakdown of the industry sector and size of the respondent organisation identified by complainants. This relates for the most part to the employing organisation against which the complaint has been made. Whilst the range of industry sector varies, those providing health care and social assistance (such as hospitals, nursing and residential care and child care services) has been identified by complainants in each year of recorded complaints. Whilst this is in large part due to the size of the industry sector, it also reflects the fact that a significant proportion of those employed in this sector are low-skilled and often engaged in part-time work or have less secure workforce attachment. It is also a sector that employs a high number of mature age workers.

Table 4: Respondent Demographics

|  |  |  |  |
| --- | --- | --- | --- |
|  | 2012–13 | 2013–14 | 2014–15 |
| **Industry sector** |
| Agriculture, Forestry and Fishing |   |   |   |
| Mining |   |   |   |
| Manufacturing | 1 |   |   |
| Electricity, Gas, Water and Waste Services |   |   |   |
| Construction |   |   |   |
| Wholesale Trade |   |   |   |
|  Retail Trade |   |   | 2 |
| Accommodation and Food Services |   |   |   |
| Transport, Postal and Warehousing |   | 1 | 1 |
| Information Media and Telecommunications |   |   |   |
| Financial and Insurance Services |   | 1 |   |
| Rental, Hiring and Real Estate Services |   |   |   |
| Professional, Scientific and Technical Services |   | 3 |   |
| Administrative and Support Services |   |   |   |
| Public Administration and Safety | 2 |   | 1 |
| Education and Training | 1 |   |   |
| Health Care and Social Assistance | 4 | 1 | 3 |
| Arts and Recreation Services |   |   |   |
| Private household |   |   |   |
| Unknown | 1 |   |   |
| **Size of organisation** |
| 1 to 19 | 1 | 1 | 2 |
| 20 to 99 | 2 | 3 | 1 |
| 100 to 499 | 2 | 2 | 3 |
| 500 and over | 3 |   | 1 |
| Unknown | 1 |   |   |
| **Type of organisation** |
| Employer | 8 | 6 | 7 |
| Recruitment company /service |   |   |   |

Significantly, it is also apparent many age-related employment complaints relate to issues that have arisen in medium to large organisations.

This is particularly disappointing as it would be expected larger organisations would have more mature HR policies and procedures. Whether this is the case or not, it is apparent there is a need for improved education and training to prevent age discrimination across all industry sectors.

# International best practice

4. What lessons and leading practices can we learn from other countries to address employment discrimination and increase workforce participation of older Australians?

## Positive ageing: the European experience

Prolonging workforce participation is a central policy objective in many developed countries.

A strong theme emerging in the European Union is the concept of ‘sustainable employability’.

Many European countries, for example, offer financial incentives to workers who are reaching retirement age to remain in the workforce. In the UK, for example, if a worker remains employed passed the age at which they are eligible for a pension they are rewarded with an enhanced pension later on or with a lump sum payment. Similarly, workers in Denmark who continued working beyond the age at which they are eligible for an early retirement pension are rewarded with tax concessions.[[30]](#footnote-30)

Central to the objective of increasing the employment of older workers is the introduction within EU countries of active ageing policies to secure increased and sustained involvement in the workforce of older workers. Key components include:[[31]](#footnote-31)

* a focus on healthy, secure working conditions;
* flexibility within companies to enable older workers to continue working while at the same time putting in place support for employers in their efforts to do so;
* improving responsiveness of public employment services to the demands of older workers; and
* identifying ways to improve workers’ employability via lifelong learning and career development initiatives and improving attitudes towards older people in general.

The Government of the Netherlands is particularly advanced in adopting the concept of sustainable employability and giving effect to programs aimed at prolonging the working lives of older employees.[[32]](#footnote-32) Its Ministry of Social Affairs and Employment, for example, has brought together 100 employers from different industries to agree a Social Manifesto aimed at concluding collective agreements that take account of the capabilities of workers, mechanisms for keeping their knowledge and skills up to date and supporting their ongoing participation in the workforce.[[33]](#footnote-33)

Spain has also introduced an active ageing strategy targeted at retaining older people within the workforce.[[34]](#footnote-34) Actions include:

* promoting healthy and secure working conditions;
* enhancing flexibility within companies (including making available reduced working hours);
* creating better links between public employment, social service and training services;
* fostering the transfer of experience on self-employment;
* combatting age discrimination within the workforce.

Norway has introduced legislative provisions to require adaptation of the workplace for those who need it and provided payroll tax exemptions as an incentive for companies to adopt key measures.[[35]](#footnote-35)

## Applying the lessons to Australia

Improving the sustainability of employment for older Australians will require improved policies that allow, for example, gradual transition to retirement, including the ability to work reduced hours and part time and get compensation from the pension system.

Policy changes that allow older Australians to receive income from employment and still receive an age pension as an incentive for older persons to remain in the workforce are a move in the right direction. However, access to superannuation generally requires that the recipient cease employment and not intend to become employed in the future on either a full- or part-time basis. Reducing the number of hours with the same employer, rather than ceasing employment, is not generally considered retiring. This requirement acts to encourage those who reach preservation age to permanently retire from the workforce, often at an age well below that of other retirees.

Whilst public policy is evolving, in general Australia retains relatively rigid divides between various life stages (work/retirement) and between work and other responsibilities (work/family). Concepts such as sustainable employability take a more holistic perspective and see the need to promote a balance between work and non-work responsibilities, therefore promoting a more sustainable approach to employment.

# Legal and Policy Framework

5. How adequately do existing laws protect older Australians from employment discrimination? How effective are the legal remedies for older workers who have experienced discrimination? How could existing laws be amended or supplemented?

6. What difficulties are there for employers in understanding and complying with legal obligations?

## Age discrimination

Both direct and indirect discrimination on the basis of age in relation to employment are unlawful under the Tasmanian *Anti-Discrimination Act 1998* (Tas) (the ADA).

Section 14(2) of the ADA provides that direct discrimination takes place if a person (including a corporation or organisation):

…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.

Section 15(1) provides that indirect discrimination takes place if

…a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who –

(a) share, or are believed to share, a prescribed attribute; or

(b) share, or are believed to share, any of the characteristics imputed to that attribute –

more than a person who is not a member of that group.

Sections 14(3) and 15(2) of the ADA provide that it is not necessary that the person who discriminates is aware that the practice or requirement is discriminatory. This is particularly relevant when considering a range of behaviours that amount to age discrimination arising from unconscious bias.

The prohibition of discrimination on the basis of age under Tasmanian law is, however, subject to a number of exceptions. Exceptions are defences whereby otherwise unlawful conduct is not unlawful if the respondent person or organisation can establish on the balance of probabilities that the circumstances are such that the exception properly applies.

Section 35 of the ADA provides that a person may discriminate against another person on the ground of age in relation to:

(a) voluntary or compulsory retirement; or

(b) voluntary severance.

Section 36 also provides that a person may discriminate on the basis of age in relation to employment if the discrimination is based –

(a) a genuine occupational qualification or requirement in relation to a particular position; or

(b) on wage rates that are based on age.

Exceptions provided under the ADA do not automatically place an action beyond the reach of discrimination law. A person can still make a complaint about those actions and in those circumstances a respondent wishing to take advantage of the exception will generally be required to prove that the exception applies.

## *Fair Work Act 2009*

The *Fair Work Act 2009* (Cth) (FWA) protects employees or prospective employees against adverse action because of discriminatory practices based on a person’s age. This also includes a refusal to hire a prospective employee based on their age. Provisions have also been included in the FWA to extend the right to request flexible working arrangements to older workers (55+) and/or workers with caring responsibilities.[[36]](#footnote-36)

The extent to which these provisions are used by older employees is, however, unclear. As outlined in earlier sections, there does not appear to be a strong awareness among older workers of their employment rights, nor does there appear to be widespread understanding among employers or their obligations under the FWA.

Greater awareness of legal rights and obligations and the inclusion of review provisions to enable those who are refused a request to have that refusal reviewed by FWA are strongly supported.[[37]](#footnote-37)

## Limits of current legislation

The *Disability Discrimination Act 1992* (Cth) is currently the only Commonwealth discrimination law containing an explicit duty to make reasonable adjustments to those with protected attributes. The inclusion of positive duties in state, territory and federal discrimination law would assist in addressing discrimination against older Australians and act as an incentive to employers to make workplace adjustments to facilitate ongoing participation of older people within the workforce.

The inclusion of provisions that would facilitate the Australian Human Rights Commission undertaking proactive measures to address discrimination would also create further opportunities to provide guidance on how to avoid such practices and develop approaches that comply with anti-discrimination obligations.

Age as a protected attribute under state, territory and federal discrimination laws is subject to a broader range of defences and exemptions than many other attributes. The effect of these provisions is to lower the level of protection available against age discrimination in many circumstances. A strong case exists for reviewing the way in which exemptions and defences work under discrimination laws across Australia to ensure that they are least restrictive and continue to be consistent with the objects of these laws.

## Beyond legislation

Strong discrimination legislation and legal protections aimed at enforcing fair work practices are important as a mechanism for sanctioning discrimination on the basis of age and act as a normative statement that age discrimination is not tolerated.

In and of themselves, however, they are not the solution.

Age-based stereotypes inform much discriminatory behaviour and strong action is needed to address ongoing prejudice (conscious and unconscious) against older workers.

While legal remedies are available to those who consider they have been discriminated against on the basis of age, it is clear many employers and those in the recruitment industry lack awareness of their legal obligations in respect of age discrimination. Broad strategies are required to promote attitudinal and cultural change across the community.[[38]](#footnote-38)

Just as there is a concerted campaign to break gender stereotypes through campaigns such as the Males Champions of Change process, there is also a need to engage employers and recruiting bodies to work against age discrimination.

# Barriers to employment

7. What are the distinct challenges faced by certain groups of older Australians (eg, women, Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse backgrounds or LGBTI people) in relation to employment discrimination?

Approximately 1.2% of the Tasmanian population aged over 65 years identifies as Aboriginal and/or Torres Strait Islander, although in some areas (such as Flinders Island) the proportion of older Aboriginal and/or Torres Strait Islander persons may be as high as 10%.[[39]](#footnote-39)

At the same time, available data indicates older Tasmanians are more culturally diverse than their younger counterparts, with approximately 28% being born overseas, commonly in Europe.[[40]](#footnote-40)

Discrimination on the basis of more than one attribute, such as age and gender or racial or ethnic background, has the potential to be both quantitatively and qualitatively different than that experienced by those who experience discrimination on each of these grounds alone.

It is clear from the data outlined earlier in this submission and in the background material provided for this inquiry that women, for example, are often considerably more disadvantaged by low levels of workplace attachment that may be exacerbated by their experiences in the workplace later in life. Recent data from the Workplace Gender Equality Agency reveals the superannuation contributions for women are 19.3% less than for men and women retire with an average of 46.6% less superannuation than men often as a result of their poor attachment to the workforce.[[41]](#footnote-41)

Similarly, the prejudice experienced by older workers from diverse racial and ethnic backgrounds is also likely to be exacerbated in older age groups. Older migrants, particularly those who have come to Australia under family reunion or humanitarian entrant programs, may lack fluency in English, be unfamiliar with Australian culture and have difficulty in getting their skills recognised in Australia. This is reflected in disproportionately high unemployment rates among recent migrants.

Across all age groups it is clear that disadvantage reduces the likelihood of being employed and this effect is compounded in older age groups. Mature age job seekers and those in employment from diverse cultural and ethnic backgrounds, as well as women, people with disability and those with other attributes, each experience distinct intersectional disadvantages which must be actively addressed through appropriate strategies.

1. Council of the Ageing (Tasmania), *Facing the Future: A baseline profile on older Tasmanians* (Department of Premier and Cabinet, 2013). [↑](#footnote-ref-1)
2. J Temple, *Past present and future of mature age labour force participation in Australia: How do regions differ?* (National Seniors Productive Ageing Centre, Melbourne, April 2014) 20. [↑](#footnote-ref-2)
3. Council of the Ageing (Tasmania), above n 1, 115. [↑](#footnote-ref-3)
4. Both because of size of the ageing population and the generally lower levels of income earned during working life in Tasmania. [↑](#footnote-ref-4)
5. Council of the Ageing (Tasmania), above n 1, 77. [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. Tasmanian Government, *Inclusive Ageing: Tasmania 2012–2014 Strategy* (DPAC, July 2012). [↑](#footnote-ref-8)
9. Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia July 2012–June 2013* (Cat No. 6238.0, Canberra) Table 6. [↑](#footnote-ref-9)
10. Peter Gutwein, Treasurer, ‘Update on public sector FTE numbers’ (Media Release, 30 April 2015). [↑](#footnote-ref-10)
11. See Department of Premier and Cabinet (Tas) ‘Workforce Renewal Incentive Program’ available at <<http://www.dpac.tas.gov.au/divisions/ssmo/Managing_Positions_in_the_State_Service/workforce_renewal_incentive_program>>. [↑](#footnote-ref-11)
12. Blair Richards ‘Auditor-General Mike Blake to probe public service job cuts’, *Mercury* (online), 8 July 2015 <<http://www.themercury.com.au/news/tasmania/auditor-general-mike-blake-to-probe-public-service-job-cuts/story-fnj4f7k1-1227432945539>>. [↑](#footnote-ref-12)
13. J Temple, *Past present and future of mature age labour force participation in Australia: How do regions differ?* (National Seniors Productive Ageing Centre, Melbourne, April 2014) 22–7. [↑](#footnote-ref-13)
14. Ibid, 28. [↑](#footnote-ref-14)
15. Australian Bureau of Statistics, *Labour Force Australia, September 2015* (Cat No. 6202.0 released 15 October 2015) Table 22. [↑](#footnote-ref-15)
16. Australian Human Rights Commission, *National prevalence survey of age discrimination in the workplace* (2015) 49. [↑](#footnote-ref-16)
17. Australian Bureau of Statistics, *Persons Not in the Labour Force, Australia September 1996–2010*, (Cat No. 6220.0). [↑](#footnote-ref-17)
18. George Leakis ‘Hockey’s plan to make us work longer won’t work’ *The New Daily* (online) July 23 2015 <<http://thenewdaily.com.au/money/2015/07/23/hockeys-plan-make-us-work-longer-wont-work/>>. [↑](#footnote-ref-18)
19. Australian Law Reform Commission, *Access All Ages – Older Workers and Commonwealth Laws: Final Report* (ALRC Report 120, 2013) 76. [↑](#footnote-ref-19)
20. WorkCover Tasmania, *Safe and Healthy: a guide to managing an ageing workforce* (WorkCover Tasmania, September 2013). [↑](#footnote-ref-20)
21. See Australian Law Reform Commission, *Access all Ages – Older Workers and Commonwealth Laws* (ALRC Report No. 20, March 2013) 86. [↑](#footnote-ref-21)
22. Ibid, 90. [↑](#footnote-ref-22)
23. Ibid, 92. [↑](#footnote-ref-23)
24. Safe Work Australia, *Comparison of workers’ compensation arrangements in Australia and New Zealand* (July 2015) [↑](#footnote-ref-24)
25. Anti-Discrimination Commissioner (Tas) *Volunteers, Age and Insurance: Investigation Report* (OADC, May 2013) [↑](#footnote-ref-25)
26. Ibid, 94 [↑](#footnote-ref-26)
27. Enquiry data relates to all age-related enquiries. [↑](#footnote-ref-27)
28. Age related complaints: 2005–06 (n=16, 14.4%); 2006-07 (n=27, 23.5%); 2007–08 (n=20, 17.1%);
2008–09 (n=31, 24.2%); 2009–10 (n=16, 14.0%); 2010–11 (n=20, 12.6%); 2011–12 (n=15, 11.3%);
2012–13 (n=21, 13.2%); 2013–14 (n=22, 12.2%); 2014–15 (n=17, 12.0%). [↑](#footnote-ref-28)
29. Percentage of complaints received identifying employment as an issue in the complaint in 2012–13 = 44.0%; 2013–14 = 49.1%; 2014–15 = 45.4%. [↑](#footnote-ref-29)
30. European Commission, *EEO Review: Employment Policies to Promote Active Ageing 2012* (Directorate-General for Employment, Social Affairs and Inclusion, April 2012). [↑](#footnote-ref-30)
31. Ibid, 19. [↑](#footnote-ref-31)
32. Sabrina Pit, ‘Sustainable employment and the ageing workforce: lessons learned from the Dutch’ (*The Conversation*) 15 January 2013. [↑](#footnote-ref-32)
33. European Commission, *EEO Review: Employment Policies to Promote Active Ageing 2012* (Directorate-General for Employment, Social Affairs and Inclusion, April 2012) 19. [↑](#footnote-ref-33)
34. Ibid, 20. [↑](#footnote-ref-34)
35. Ibid, 20. [↑](#footnote-ref-35)
36. Australian Law Reform Commission, above n 18, 86. [↑](#footnote-ref-36)
37. Ibid, 92. [↑](#footnote-ref-37)
38. See Australian Law Reform Commission, *Access all Ages – Older Workers and Commonwealth Laws* (ALRC Report No. 20, March 2013) 80–1. [↑](#footnote-ref-38)
39. Council of the Ageing (Tasmania), above n 3, 35. [↑](#footnote-ref-39)
40. Ibid. [↑](#footnote-ref-40)
41. Workplace Gender Equality Agency, ‘Pay gap leads to 19.3% annual super contribution shortfall for full-time women’ (Media Release, 4 December 2015) <<https://www.wgea.gov.au/sites/default/files/20151204_MR_superpaygap.pdf>>. [↑](#footnote-ref-41)