



Age Matters:

a report on age discrimination



**Human Rights and
Equal Opportunity Commission**

May 2000





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Human Rights and Equal Opportunity Commission



Hon. Daryl Williams AM QC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney

Pursuant to the Commission's functions under sections 11(1)(j) and (k) and 31(e) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), I present *Age Matters: a report on age discrimination*. The report details issues raised in submissions to a discrimination paper on the subject published in April 1999. It presents a number of recommendations for action by the Commonwealth.

Yours sincerely

Chris Sidoti
Human Rights Commissioner

May 2000



Contents

1	Introduction	7
1.1	Age distinctions	7
1.2	Age discrimination	11
1.3	Complaints to HREOC	15
1.4	This inquiry	17
2	Older people at work	19
2.1	Recruitment	19
2.2	Education and training	29
2.3	Promotion	31
2.4	Workers' compensation	32
2.5	Trade union membership	34
2.6	Retrenchment and redundancy	35
2.7	Compulsory retirement	39
2.8	Superannuation	43
3	Young people at work	55
3.1	Recruitment	55
3.2	Junior wage rates	58
3.3	Termination of employment	64
3.4	Harassment and ill-treatment	65
4	Other discrimination	67
4.1	Income support for young people	67
4.2	Work for the Dole	71
4.3	Income support for older people	72
4.4	Immigration	77
4.5	Health care	78



4.6	Accommodation	80
4.7	Insurance	82
4.8	Financial services	84
4.9	Concessions	85
4.10	Other age inconsistencies	86
5	Australia's international undertakings on age discrimination	89
5.1	ILO 111	89
5.2	ICCPR and ICESCR, article 2	91
5.3	ICCPR article 26	96
5.4	Other international commitments relevant to age discrimination	97
6	Recommendations	101
6.1	Overview of submissions	101
6.2	Findings and recommendations	107
Appendix 1	References	120
Appendix 2	Submissions	122
Appendix 3	Acknowledgments	124



Acronyms

ACCI	Australian Chamber of Commerce and Industry
ADF	Australian Defence Force
AIRC	Australian Industrial Relations Commission
APS	Australian Public Service
ASFA	Association of Superannuation Funds of Australia
ATM	Automatic Teller Machine
CEOE	Council for Equal Opportunity in Employment
CES	Commonwealth Employment Service
COTA	Council on the Ageing
CPSU	Community and Public Sector Union
CROC	<i>Convention on the Rights of the Child</i>
DEWRSB	Department of Employment, Workplace Relations and Small Business
DOME	Don't Overlook Mature Experience
DSP	Disability Support Pension
EOC	Equal Opportunity Commission
HREOC	Human Rights and Equal Opportunity Commission
HREOCA	<i>Human Rights and Equal Opportunity Commission Act 1986</i>
HRC	Human Rights Commissioner
IAA	Institute of Actuaries of Australia
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
IEU	Independent Education Union
ILO	International Labour Organisation
JSCI	Job Seeker Classification Instrument
PIN	Personal Identification Number
NCYLC	National Children's and Youth Law Centre
TAFE	Technical and Further Education
UNEMPA	Unemployed Persons Advocacy
YACWA	Youth Affairs Council of Western Australia
YANQ	Youth Affairs Network of Queensland



1 Introduction

1.1 Age distinctions

Many age distinctions have long been taken for granted in Australian law and policy. They affect people at both ends of the age spectrum – both younger and older Australians.

Young people and age distinctions

There is an extensive array of age distinctions, limits and thresholds affecting young people. Some age distinctions are necessary to ensure that young people receive the special protection they need in certain circumstances. For example, a child who is not sufficiently mature to make health-related decisions cannot either consent to or refuse treatment. In such cases this authority is reserved to the parents, legal guardians or, in some circumstances, the Family Court.

A person must be at least 18 to be a party to civil litigation in his or her own name in the High Court, the Federal Court or the Supreme Courts of the states and territories. On the other hand, children may initiate proceedings in their own right in the Family Court and complain to the Human Rights and Equal Opportunity Commission (HREOC).

Also falling into this category of protective age limits are the age of consent to sexual activity, marriageable age, the legal drinking age, the minimum age of holding a driver's licence and the compulsory school age.



Other age limits define the rights and responsibilities of citizenship. For example, young people under the age of 18 are not entitled to vote. The Youth Justice Coalition proposes that alternatives to the 18 year limit to voting rights be explored, in particular the suggestion that voting be optional from the age of 16, but not compulsory until 18 years of age (submission 45, page 7).

Those under the age of 18 are unable to vote. They can drive a car, pay taxes, legally have sexual intercourse etc, but they can not vote. This is a powerful part of our population and such change may in itself contribute to a change in discrimination based on age in our society (submission 48, Kids Help Line, page 1).

Other age distinctions are not universally approved.

Age differentiation can be justified where it is intended to provide special protection for younger people or to compensate them for disadvantages which are related to their physical immaturity, lack of life experience or their vulnerability to exploitation. But there are many examples of laws and policies created to promote the welfare of children and young people having the effect of disadvantaging them with no corresponding benefits. Age criteria are often used arbitrarily to simplify the making or administration of laws, policies or programs affecting large numbers of people (Ludbrook 1995, page 2).

We acknowledge children's needs for special legal protection. However, we do not support measures that are overly paternalistic or that deny children the right to participate in decisions affecting them (submission 45, Youth Justice Coalition, page 6).

The Youth Justice Coalition is very critical of the NSW Government's focus on law and order policies and legislation targeting young people. The *Children (Protection and Parental Responsibility) Act 1997 (NSW)*



empowers police to approach and question a young person under the age of 16 who is in a public place and not supervised by an adult. In certain circumstances the police may remove the young person to the family home, a relative's or carer's home or an 'approved place'. The young person must remain at that place for 24 hours. The Act only operates in communities that have made a direct application to and received approval from the Attorney-General.

The Youth Justice Coalition submits that this legislation is age discriminatory and in breach of the *Convention on the Rights of the Child* (submission 45, Youth Justice Coalition, page 4).

This and a number of other submissions also raise the issue of young people being ejected from shopping centres and malls.

We have heard numerous reports of young people being ejected or banned from shopping centres, often for spurious reasons which would not be applied to older people ... Driving young people away from shopping centres interferes with rights such as freedom of association and of peaceful assembly and participation in leisure, recreation and cultural activities. It may also deny them access to services such as shops, banks, libraries and Centrelink offices. In our view, such practices are clearly discriminatory and should not be tolerated (submission 45, Youth Justice Coalition, page 5).

Older people and age distinctions

Older people, too, complain of some age limits which, they argue, are discriminatory in effect. They refer to their difficulty in obtaining employment and to compulsory age-based retirement.

The requirements for elderly drivers to resubmit regularly for testing is another prominent example.

There does not seem to be sufficient statistical evidence that justifies elderly drivers being treated differently from younger



drivers. We note that with respect to car rentals, companies impose more onerous conditions on younger drivers allegedly on the basis that they are more likely to have an accident. Any discrimination against a person with respect to driving on the basis of age should be based on safety considerations and made on the basis of sound statistical data about drivers in that age group (submission 13, Kingsford Legal Centre).

Older people should not be required to have a licence test every year after 80/85 – this is blatant discrimination. There is justification to require a medical test but no more. Like all ages, they should be judged according to performance – if they break the law and/or have a string of accidents etc they will lose their licence like people of any age (submission 35, Professor Rhonda Nay, page 1).

On the other hand, a number of submissions argue that safety considerations justify regular testing of older drivers.

As a fifty-six year old I am only too aware that my time behind the wheel is starting to run out. However, I have to support regular medical assessment for older drivers. Statistically, I understand that their risk – per kilometre travelled – is the same as for the under 25s. The difference is that the under 25s accident rate is due to inexperience, speed and (in some cases) alcohol. These factors seem to disappear with maturity – assuming the drivers survive long enough. In the meantime, legal sanctions are applied to try to remove the worst miscreants from the road. Unfortunately the reasons for elderly people being involved in accidents are less likely to resolve themselves with time (submission 22, B Holderness-Roddam, page 2).



1.2 Age discrimination

Age discrimination occurs where an opportunity is denied to a person solely because of his or her chronological age and age is irrelevant to the person's ability to take advantage of that opportunity. Age is commonly used as an efficient proxy for desired characteristics such as fitness, financial viability, responsibility, honesty or skill. This will be discriminatory when age does not provide a true indication of the characteristic.

Age discrimination against older people in employment is the issue most commonly raised in submissions to the Commission's inquiry on age discrimination.

There is now substantial research which shows that many older workers feel they have been discriminated against on the ground of age (see the references in Appendix 1, especially Bennington and Tharenou 1996, Encel and Studencki 1996 and 1997, Drake Consulting Group 1999, House of Representatives inquiry submissions and the Queensland *Age Discrimination Phone-In* 1998). In much of this research it is difficult to determine whether older applicants and employees simply suspect or believe they have been discriminated against or whether they have experienced discrimination in fact. Obviously there are many other factors which may influence the decisions made by an employer about a particular applicant and there are instances when an applicant may incorrectly presume this to be based exclusively or principally on age. They may appear to be based on age because, as a group, older workers share certain labour force characteristics. For example, a larger percentage of older workers than younger workers have limited computer skills.

Nevertheless, in many cases older workers are able to identify clearly that their age is the primary reason they failed to obtain employment, promotion or training.

At forty-five I have not even been considered for an interview for many private enterprise jobs. I was told privately by an



employee of the now debunked CES that my only hope was to get on a pension or if possible start my own business as no one would employ me at my age. In the job search I noted that ninety percent of job ads stated they wanted 18 to 25 year olds, the job ads that did not have this stipulation required some special knowledge or experience with a particular machine or computer program. It appears that any indication of age is a bar from gaining employment, I have found more success if I do not give any indication of my age. This means only giving details of recent employment and leaving out the dates of previous employment (submission 52, A D Wickens).

There is also evidence that many employers hold negative attitudes towards the employment of older workers. For example, a recent survey by Drake Personnel of the top 500 employers indicated that none would chose to employ managers and executives in their 50s and 65% said this group would be the first to go in the event of retrenchments (Drake Consulting Group 1999).

Age discrimination in employment takes place in a context of negative attitudes and stereotypes of older people in general. Whether in recruitment, promotion, training, retirement or redundancy, older people are left feeling judged on their age rather than their abilities. They are made to feel expendable.

It is nonsense and ridiculous that the year I was born dictates that I have to be retired, when I am both an excellent performer and in dire need of the dollars. And have never been ill or incapacitated or absent. Performance and attendance should be the only criteria - measurable ability to do the job, and being there to do it every day (submission 25, S Hutton, page 1).



Young people also face employment-related age discrimination. Again much of this is based on stereotypes and assumptions about their abilities. For example, young people are assumed to be unreliable, incompetent and lacking in the skills and confidence to deal with other people in a range of situations. Although young people may require special consideration and protection in accordance with their developing maturity, age should not be used as an excuse to treat them unfairly or without due regard for their individual capabilities.

Discrimination against young people occurs within a wider context of community attitudes towards them.

Ageism and the age discrimination derived from it require the continued proactive maintenance of particular myths and folklore about young people, eg. the moral panics of supposed youth crime waves. This maintains young people's devalued status.

The position of young people in our society is increasingly typified by a position of relative poverty, powerlessness and marginalisation. When people speak of young people the words that seem to spring to mind include unemployment, homelessness, suicide, depression, juvenile crime, drugs and family breakdown. Words such as opportunity, hope, ambition, energy, enthusiasm, imagination, aspirations, initiative, careers and beginnings seem to have been forgotten (submission 14, Youth Affairs Network of Queensland, pages 2 and 3).

Age discrimination under State and Territory law

Age discrimination is unlawful in all States and Territories in the areas of employment, education and training, accommodation, goods and services and clubs. However, there are significant variations in the protection extended. For example, in some States and Territories employers are permitted to take age into account when offering voluntary redundancy packages. Under the *Equal Opportunity Act*



1984 (WA), for instance, it is not unlawful to offer participation in a voluntary severance scheme on the basis of age. In Victoria employers can offer incentives to retire or resign and it is lawful to take into account the employee's age and eligibility for superannuation benefits when choosing which employees to make the offer to.

Employees of the Commonwealth cannot submit employment discrimination complaints to State and Territory equal opportunity agencies.

Age discrimination in federal law

The *Workplace Relations Act 1996* contains a number of provisions aimed at eliminating discrimination in employment, including on the ground of age. The principal object of the Act refers to 'respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin' (section 3(j)). The Act requires that the Australian Industrial Relations Commission (AIRC) has regard to these aims in the performance of its award-making and review functions and certification of agreements.

Section 170CK of the Act stipulates that an employer must not terminate an employee's employment for reasons of, or including, discrimination on the ground of age. Certain employees are excluded from these provisions under *Workplace Relations Regulations*, including short-term casuals.

There are also exemptions in the Act for

- junior rates of pay
- discrimination on the basis of the inherent requirements of the job



- discrimination in respect of staff at an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular creed on the basis of those teachings or in good faith.

In the federal jurisdiction age discrimination in employment is a ground for complaint under the *Human Rights and Equal Opportunity Commission Act 1986* (HREOCA). However, the Act does not make discrimination unlawful and the Commission's determinations are not enforceable.

The Commission's complaint handling procedure is available only for employment-related age discrimination. Employment includes 'access to vocational training, access to employment and to particular occupations, and terms and conditions of employment' (ILO 111 article 1.3).

Moreover, where an employment-related age restriction is set out in federal legislation, the Commission cannot accept the complaint. In such cases, however, the Commission may examine the legislation and recommend its amendment in line with Australia's international undertakings where necessary (see Chapter 5).

1.3 Complaints to HREOC

Despite the limits of its jurisdiction, the Commission has received numerous complaints about employment-related age discrimination including

- complaints about age stipulations in job vacancies listed by Job Network agencies
- complaints about age stipulations in job vacancies and promotional opportunities in the defence force
- complaints from workers over 65 who were refused employment by employers citing age limits under legislation
- complaints about age discrimination in trade union membership



- complaints from older people about discrimination in the offer of redundancy packages and the monetary value of the packages.

HRC Reports

The Commission examined some of these complaints of age discrimination in employment in three reports to the Attorney-General.

HRC Report No. 1, *Compulsory Age Retirement*, examined complaints by four pilots who were compulsorily retired at age 60 from their employment with a major airline. The Human Rights Commissioner found that the policy of compulsory retirement upon attaining the age of 60 constituted discrimination on the basis of age. He recommended the repeal of compulsory retirement provisions in the *Public Service Act 1922* and in other federal legislation. The Commissioner also recommended that the Commonwealth legislate to provide a comprehensive national prohibition of age discrimination.

HRC Report No. 2, *Redundancy Arrangements and Age Discrimination*, concerned complaints against two state government employers about the use of age distinctions in the formulation of redundancy entitlements. The complainants submitted that the monetary value of the voluntary departure packages they received as employees over the age of 50 were substantially less than the value of packages offered to younger employees and constituted discrimination on the ground of age as defined in the *Human Rights and Equal Opportunity Commission Act 1986*. The Human Rights Commissioner found that the acts complained of constituted discrimination on the basis of age. He recommended that the practice of discriminating against older employees in determining the value of voluntary departure packages be abolished. The Commissioner also recommended the removal of age discrimination against older workers from redundancy entitlement provisions in employment laws, policies and practices,



and again recommended that the Commonwealth legislate to provide a comprehensive national prohibition of age discrimination.

HRC Report No. 4, *Age Discrimination in Trade Union Membership Rules*, examined a complaint of age restriction in trade union membership rules. The complainant was a member of a union the rules of which required members to retire from full membership at the age of 65 unless exempted by the Federal Executive of the union. The complainant was denied an exemption from the Federal Executive and transferred to honorary membership, which restricted his opportunities to work as an engineer. The Human Rights Commissioner found that the union's actions constituted discrimination in employment based on age and recommended that the relevant union rule be repealed and that the complainant be granted an apology and compensation. He also recommended that the *Workplace Relations Act 1996* be amended to provide that any discriminatory rule of a registered organisation of employees is invalid to the extent to which it is discriminatory on any of the grounds specified in section 3(j) of that Act.

1.4 This inquiry

In light of concerns about age discrimination, the many inconsistencies between State and Territory anti-discrimination laws and the fact that Commonwealth employees and many Commonwealth laws and policies are not free from age discrimination, the Commission instituted an inquiry into the need for federal age discrimination legislation by publishing a discussion paper in April 1999. This paper, entitled *Age matters? a discussion paper on age discrimination*, invited submissions which particularly addressed

- suggestions for countering negative stereotypes about both young and older people
- whether age discrimination in employment could ever be justified



- whether age-based distinctions could ever be justified in insurance, workers' compensation or superannuation
- whether the federal parliament should enact an Age Discrimination Act.

During the course of the Commission's inquiry two related inquiries were conducted by other federal agencies.

Pursuant to section 120B of the *Workplace Relations Act 1996* the Australian Industrial Relations Commission inquired into the feasibility of replacing junior wage rates with non-discriminatory alternatives in federal awards and agreements. The Act exempted junior rates from its age discrimination provisions pending the AIRC inquiry that was required to report before 22 June 1999.

The second inquiry was launched on 9 March 1999 by the House of Representatives Standing Committee on Employment, Education and Workplace Relations, chaired by Dr Brendan Nelson MP (the House of Representatives inquiry). That inquiry covered 'the social, economic and industrial issues specific to workers over 45 years of age seeking employment, or establishing a business, following unemployment'. At the date of the finalisation of this report, the House of Representatives inquiry report remained unavailable.

Fifty-seven submissions were received in response to the HREOC discussion paper (see Appendix 2).

Chapters 2 to 4 of this report summarise submissions received. The report concludes with a review of Australia's relevant international obligations (Chapter 5) and recommendations for federal action (Chapter 6).



2 Older people at work

2.1 Recruitment

I was registered for unemployment and when I asked why no jobs had been referred, I was told by a CES staff member that I was past my use by date (male 45-49 years quoted in Age Discrimination Phone-In 1998, page 28).

Responses to the Commission's discussion paper reveal that recruitment is the main area where older workers encounter discrimination. The problem is especially severe for older unemployed job seekers. Almost two-thirds of unemployed job seekers aged over 55 report that the most difficult problem they face in finding work is being considered 'too old' by employers (ABS 1998). Some older workers are also discouraged from looking for work because they believe employers consider them too old.

You don't get an interview if you list your age. I have never failed to get the job where I've had an interview. When I have not listed my age in the application, so they don't know till I get there, then I get the job because my qualifications are impeccable and referees enthusiastic (submission 25, S Hutton).

At 19 I was told I was too old for a position as trainee communications technician. At 33 I was considered too old



by most employers in the rural area to which I had moved. My current (Federal Government) employer is recruiting (uniformly young) university graduates and favouring them for promotion over (uniformly older) experienced, though less formally educated employees (submission 2, D Boxall).

The Department of Employment, Workplace Relations and Small Business (DEWRSB) found that mature people generally have little difficulty holding onto their jobs but that once they lose them they have greater difficulty than younger people in getting back into employment. The Department attributes this to a number of factors

- the mismatch between the skills possessed by mature age job seekers and the needs of the labour market
- reduced labour mobility associated with lower preparedness to change industry and/or occupation and a greater commitment to a geographical location and
- age discrimination (submission 19, DEWRSB, page 11).

The Council on the Ageing (Australia) (COTA) also supports the finding that age discrimination in recruitment is prevalent, identifying age discrimination as the single most important issue facing older people in the labour market (submission 46, COTA, page 1).

On the other hand, some employers think that age should be able to be taken into account in recruitment decisions. Nissan Motor Co. (Australia) comments that it is difficult for employers to employ balanced numbers of both older and younger age groups. If younger workers do not have much experience, Nissan comments, there is a danger that older workers will fill all the positions.

We are not sure that introducing measures to eliminate age discrimination for older workers would in effect disadvantage or be a discriminatory practice against the younger age group. We often have older people who have worked in more senior positions applying for positions at more junior levels and are



considered to be overqualified for the position (submission 44, Nissan Motor Co., page 1).

Employment agencies

Several submissions on the discussion paper raise the issue of age discrimination in the practices of government and private employment agencies.

The Unemployed Workers Group (Townsville/Thuringowa) points out that older unemployed people can become discouraged at Centrelink offices even before applying for a job.

A local (Townsville citizen) 59 year old unemployed person was frankly informed by a Centrelink Official that 'employers were not interested in anyone over 28 years of age' ... This situation typifies the prevailing discrimination and the reality which more unemployed people face in their struggle to secure a job (submission 6, F Costanzo).

COTA also raises the issue of discrimination within recruitment and employment agencies. In July COTA ran a focus group with unemployed mature aged people in Melbourne.

[Participants] felt that like the public employment agencies, the private employment agencies had 'parked' them: that is, took no interest in them and left them to wilt on their books.

They believed that the agencies had profiles of the sort of people that they were looking for on behalf of employers and the agencies were paid on a commission basis to supply the candidates that fitted the profile. There was thus automatic discrimination built into processes of the recruitment agencies (submission 46, COTA, page 5).

Employment agencies ask your age, they say that clients insist on this (female 40-44 years) (Age Discrimination Phone-In 1998, page 28).



DEWRSB points out that measures exist to safeguard against age discrimination in the federal government's Job Network. There is a Code of Conduct which specifically requires Job Network members to serve all job seekers and employers without favour or prejudice and meet minimum standards of service. Breaches of the Code may be referred to the Department which, in turn, may refer complainants to this Commission. The Code also provides for sanctions to be imposed when a complaint is not remedied or where subsequent complaints about the same or related matters occur or when the Department's monitoring staff are concerned about an issue.

Job Network members lodging vacancies on the government's national job vacancy database, 'Australian Job Search', are contractually bound to adhere to all Commonwealth, State and Territory legislation as well as the Code of Conduct. Employers lodging vacancies are also reminded to comply with legislation. Those who do not comply may be investigated and denied access to the database or, in serious cases, referred to appropriate agencies such as HREOC.

Exceptions to anti-discrimination legislation for certain occupations

In general, submissions on the discussion paper recommend the removal of all age-related requirements for employment positions as the rule rather than the exception.

Ability and experience should be the only two factors taken into account in workplace issues, including recruitment, training, promotion, retirement and redundancy (submission 34, Office of Seniors Interests, WA, page 1).

Hobart Community Legal Service recommends

1. *That no age identifying references be placed within any job description.*
2. *That any age identifying references may be lawfully deleted by the applicant in applying for a position*



3. *That current references which have been dated (ie. Academic records) can be reissued without age identifying references included (submission 30, Hobart Community Legal Service, page 1; see also submission 47, Hobart City Centre Congregation and submission 33, Community and Public Sector Union, page 3).*

However, some responses also discuss the need for certain occupations to be exempt from age discrimination legislation with respect to recruitment.

Generally anti-discrimination legislation provides three types of exceptions.

1. Some occupations are specifically exempted.
2. If age can be shown to be an inherent requirement of the job, the age criterion will not be unlawful.
3. Discrimination required or authorised by other legislation may be explicitly protected.

1. *Specific exemptions*

The Australian Chamber of Commerce and Industry (ACCI) opposes age discrimination legislation. However, should it be introduced, ACCI calls for an 'exemption in respect of specified levels of management' (submission 17, ACCI, page 5). ACCI points out that in the USA management is completely exempt from age discrimination prohibitions. ACCI suggests either an exemption based on a definition of salary level and position or a provision which enables an executive to be 'displaced' at a nominated age but to continue in employment if he or she wishes at a lower level and lower paid job.

Other submissions argue that a certain standard of health should be required for certain occupations but that methods of screening other than by reference to age should be used. For example, when recruiting



doctors, continuous education and testing is seen as the best way to ensure safety.

Doctors should be re-tested and [undertake] continuous education programs (submission 41, S Rimmer, page 4).

2. Inherent requirements of the job

The *Workplace Relations Act 1996* and the *Discrimination (Employment and Occupation) Convention (ILO 111)* provide for exemptions from age discrimination provisions when the age distinction is based on the inherent requirements of the job.

A number of complaints made to the Commission about age distinctions in the defence forces require an assessment of the inherent requirements of the particular job. In *Bradley's Case*, Mr Bradley complained that he was discriminated against by the Australian Army when he was denied entry to the Specialist Service Officer Scheme. Entry was limited to officers between 19 and 28 years of age. Mr Bradley was 37 years of age. The army argued that older officers by nature of their age did not have the required degree of fitness or ability to cope with stress and were unable to unlearn acquired skills and habits. In this case the Commissioner found that there was insufficient evidence to establish a direct correlation between the applicant's age and the ability to meet entry criteria and that the age requirement was therefore discriminatory. The Federal Court has twice upheld the Commission's findings.

In some circumstances it may be appropriate to use age as a proxy.

For example it would be futile to require the respondent to assess persons below fifteen years or over seventy years for acceptance to the SSO Scheme. However, it is only acceptable to use an age proxy where there is no, or so little, possibility of someone in that age group being able to comply with the inherent requirements of the job that to require the respondent to expend resources on assessing the applicant through the



selection process would be unreasonable (Commissioner Sidoti quoted by Justices Black, Tamberlin and Katz in *Bradley's Case*).

ACCI points out that in many cases it is difficult for employers to assess whether age is an inherent requirement of the job or not. For example, in *Christie's Case* judges gave opposing interpretations of the meaning of inherent requirements. ACCI argues that the burden of proof should be placed 'not on the employer but on those objecting to a contention that a restriction is an inherent requirement of the job' (submission 17, ACCI, page 8).

Kingsford Legal Centre argues that there should be exceptions for reasonable health and safety requirements, for dramatic performances for reasons of authenticity and for providing services to people of a particular age where those services are most effectively provided by persons of a particular age (submission 13, Kingsford Legal Centre, page 5).

3. *Age distinctions specified in legislation*

In the Australian Defence Force (ADF) many age distinctions are specified in legislation and regulations. One complainant to the Commission, aged 41, wanted to apply for a position as Airfield Defence Guard in the Ready Reserve of the Airforce. However, eligibility is restricted to those aged 17 to 35 years. The Commission was obliged to decline this complaint because the ages are specified in the Air Force Regulations. The Commission is unable to deal with complaints where the action complained of is required by federal legislation or regulations.

The ADF did not respond to the Commission's discussion paper. However, the ADF has advised the Commission that it is currently conducting a review of age-related issues that are not established in law. This is expected to be completed by June 2000.



Special measures of assistance for unemployed older workers

Because of the discrimination many older unemployed people face in finding employment, several submissions recommend special programs to assist certain age groups.

I approached my local federal member to have people over forty-five to be considered in the preferential clause when applying for employment. In short the Minister stated that there was no need as forty five year olds were not a disadvantaged group, yet when I was offered a case manager an officer of the CES told me my only chance was to start my own business or get on a pension. When I was in case management my case manager informed me government was my only chance as 98% of the positions were for 18 to 25 year olds and the others required specialist skills (submission 52, A D Wickens, page 16).

In its submission DEWRSB describes some special measures it has put in place to assist older workers. The difficulties faced by older unemployed workers are recognised in the Job Seeker Classification Instrument (JSCI) administered by Centrelink which determines the level of difficulty a job seeker may experience in getting a job. Using JSCI a job seeker is given a score which determines the type of assistance he or she will receive. It allocates age-related points for level of disadvantage which increase with age. Males aged 45 and over receive more points than females aged 45 and over in recognition of the additional difficulty they experience in finding a job (submission 19, page 16). Mature aged job seekers are more likely to receive higher levels of Intensive Assistance than younger groups.

Other submissions recommend that DEWRSB should contract job agencies which specialise in assisting unemployed older people as some Job Network agencies have little expertise in this field.

A. *Sponsor a group such as UNEMPA [Unemployed Persons Advocacy] in Brisbane or DOME [Don't*



Overlook Mature Experience] in Brisbane to educate and inform via media and brochure flyers

- B. Commonwealth and State governments to fund a campaign similarly to the \$5 million allocated in 1999 Federal budget (submission 3, K Brennan, page 1).

COTA recommends that the Commonwealth government ‘develops specific policies, programs and strategies for mature age people seeking employment’, citing the Mature Workers Program in NSW as an example of a successful program which specialises in providing assistance to people over 40 (submission to the House of Representatives inquiry, page 24).

Employer assistance

Submissions on the discussion paper indicate a number of difficulties which employers face in applying principles of non-discrimination on the ground of age in recruitment. These include

- the difficulty of balancing non-discriminatory work practices with maintaining a diverse workforce
- lack of clarity as to what constitutes an inherent requirement of the job
- the difficulties of assessing individual performance in recruitment processes without the assistance of a broad disqualifier such as age.

Responses indicate a role for the federal government in public and business education on the benefits of older workers accompanied by practical assistance on how to manage an age diverse workplace.

There would be many employers who would seek the older age groups. We need to target the employer group that is more likely to benefit, like smaller companies, and promote the value of the extensive skills and experience of the older workers (submission 44, Nissan Motor Co., page 1).



In terms of the education aspect of the model, the approach should not be limited to legal compliance. The education phase should also encompass the benefits of encouraging a diverse and flexible workplace, of which age is clearly one aspect (submission 39, Council for Equal Opportunity in Employment, page 15).

COTA believes that it is essential for age discrimination legislation to be accompanied by a community education campaign that will reinforce the intention of the legislation but which focuses on the positive aspects of behaving and making decisions in ways that are free from age bias. There are many important messages that need to be promulgated but the following are critical:

- *There are real benefits to employers by maintaining a balance of ages in the workforce in terms of productivity.*
- *Australia's ageing population means that a higher proportion of the community's wealth is locked up in the older population and that the best use of these assets will require a positive outlook on older people as a market for goods and services.*
- *Social cohesiveness and harmony will be enhanced by a positive outlook on ageing and attitudes that are free from age bias (submission 46, COTA, page 2).*

Similar recommendations emphasising the importance of employer education were made in submissions to the House of Representatives inquiry. DEWRSB, for example, reports a lack of awareness of existing age discrimination legislation among 400 employers surveyed recently (Ralph Yates, DEWRSB, House of Representatives inquiry, public hearing in Canberra, 9 December 1999).



2.2 Education and training

I was asked my age, I was then sixty-nine. It was then pointed out to me that I would be in my mid-seventies by the time I submitted my thesis. This supervisor then suggested that I could be sorry when I looked back on 'those wasted years', and he was sure I had something 'more worthwhile' to do with my time. After this conversation I felt uncomfortable and 'out of place' when I went to the Department in which I studied or to the University libraries. After a great deal of soul searching I decided to withdraw my candidature in July 1999 (submission 50, page 1).

Workplace training and lifelong learning are becoming increasingly essential in an environment of greater workplace mobility and rapid technological change. If older workers are locked out of these opportunities their precarious position in the workforce will be further weakened. There have been complaints to the Commission of employers using age as a criterion for providing training to employees because of a concern about return on their investment and perceptions that older workers are more difficult or reluctant to train.

The majority of responses to the discussion paper consider that training should be included in any age discrimination legislation. Access to education and training is perceived as essential to maintaining employability and increasing older unemployed people's access to employment.

Older workers should not be denied opportunities for training. An employer cannot predict whether a person is likely to remain in a job based on the person's age. Denying an older person training on the basis of their age may cause them to be forced out of the workforce unwillingly as they cannot keep up with developments necessary to perform their jobs, for instance developments in new technology (submission 13, Kingsford Legal Centre, page 1).



COTA also points out the priority given to education and training among mature people searching for new jobs. A participant in a COTA focus group consultation had worked for one employer for 20 years and wished to remain. However, the employer was not prepared to invest in information technology training for her. She was forced to leave because she did not have skills in the new technology. Other participants also criticised employers for not being prepared to invest in older workers which deskilled older people and made them vulnerable to redundancy (COTA (Australia), submission to the House of Representatives inquiry, page 16).

In some industries, such as information technology, maintaining skills is seen as fundamental to retaining good staff whereas in more conservative fields there is no tradition of life-long learning and subsequently training is not offered to more experienced workers. This erodes the re-employability of the workforce (submission 2, D Boxall).

The Council for Equal Opportunity in Employment supports this view:

[I]n the IT industry because of the need to continually learn new skills (basically every 3 years 'skill sets' can go from being relevant to irrelevant) training is necessary for everyone irrespective of age. What is considered when assessing needs for training is what will benefit the individual and the business (submission 39, CEOE, page 8).

Several submissions criticise the exclusion of unemployed older workers from traineeship and apprenticeship programs.

A 48 year old unemployed man writes that he is 'shut out of occupations such as dental assistant, pharmacy assistant, most traineeships and the bulk of retail training positions' as they only train teenagers (submission 15, D Grigg, page 2).



An ex-CES worker questions why nearly all apprentices are teenagers.

There are provisions for mature age apprenticeships, but such apprentices are a vanishingly small minority (submission 2, D Boxall, page 1).

On the other hand, ACCI calls for

an exemption from the obligation to train older people where the cost considerations and potential return on the cost make this reasonable (submission 17, ACCI, page 5).

2.3 Promotion

[A] male teacher who applied for a subject coordinator's position was asked why he did not seek such a position twenty years ago (submission 12, Independent Education Union, page 5).

In a rapidly changing work environment access to promotion is an important ingredient in maintaining employability. In some jobs older workers are viewed positively for promotion. In others 'old' is seen as outdated and 'new blood' is pursued. As with training, some employers may be concerned about the costs of promoting someone close to retirement. However, with the disappearance of compulsory retirement in workplaces, employers cannot assume that an older person will retire at any given age.

ACCI argues that exemptions from age discrimination legislation should apply for promotion to specified levels of management (submission 17, ACCI, page 9).

The Independent Education Union (IEU) details the case of an older worker who was discriminated against in applying for a promotion in NSW. She had been teaching for approximately 40 years. Although she had frequently filled the role of Coordinator on top of her usual teaching duties without pay, when she applied for a paid promotional



position she was asked, ‘Why at your age are you only now applying for a promotions position?’. At a subsequent interview she was asked, ‘At your age can you handle stress?’.

Such an experience was damaging to my confidence in applying for promotions positions or in using my abilities and experience to their fullest extent. I consider that this thoughtless ageist discrimination was damaging to me personally and to the educational climate of the school in which I was employed (submission 12, IEU, page 7).

2.4 Workers’ compensation

Compensation should aim to support the injured if necessary for the rest of their lives. The system should assist them to return to work to the limit of their capabilities. The question of age then becomes irrelevant (submission 2, D Boxall, page 2).

Workers’ compensation legislation gives a worker who is injured at work or who has a disease to which work has contributed the right to recover compensation without having to prove that the employer is at fault. The compensation benefits may include lump sum payments, the cost of medical payments and weekly incapacity benefits.

Workers’ compensation schemes differ across Australia as specified in State and Territory workers’ compensation and rehabilitation legislation. Only in Queensland and the ACT are there no age limits on workers’ compensation weekly benefits.

Until 6 December 1999 current and former federal public servants aged 65 and over were unable to receive weekly benefits for loss of income under the Commonwealth’s *Safety, Rehabilitation and Compensation Act 1988*. With the recent prohibition of compulsory retirement in the Australian Public Service (APS) an amendment



was made to the *Safety, Rehabilitation and Compensation Regulations*. Australian Public Service employees are now entitled to receive incapacity benefits for a maximum of two years at any age after 63.

This is a welcome amendment which removes to a certain extent barriers to Commonwealth public service employment for older workers. However, it should be noted that this amendment applies only to APS government employees. Employees of Telstra, for example, are not covered. In addition, the distinction between those under 63 and those over 63 remains. While those under 63 are entitled to receive incapacity benefits up to 63 years of age for as long as they need it, those over 63 are still limited to a maximum of two years.

The *Seafarers Rehabilitation and Compensation Act 1992* also limits weekly incapacity payments to persons under 65 years of age except in the case of a person who is injured after 64 years, when compensation is payable for a limit of 12 months.

ACCI's submission does not support any change to workers' compensation arrangements because it maintains that the cost viability of workers' compensation schemes is important to uphold (submission 17, ACCI, page 9).

The Council for Equal Opportunity in Employment submits that access to workers' compensation is not a major issue for members at present. However, it agrees that as the workforce ages the inconsistencies between states and territories and the Commonwealth may become a problem. Consistency between discrimination laws and other laws that impact on the conditions of employment would greatly assist in the implementation of policies and guidelines for older workers (submission 39, CEOE, page 8).

DEWRSB recognises that the issue of age restrictions in workers' compensation schemes should be addressed, although caution must be applied to avoid the imposition of prohibitive costs on the scheme.



Failure to eliminate or reduce discrimination in the Commonwealth workers' compensation scheme against employees aged over 65 would be inconsistent with Australia's obligations under the International Labour Organisation C111, the Discrimination (Employment and Occupation) Convention, 1958 (submission 19, DEWRSB, page 11).

The Department advises that the government is currently investigating options to address this issue in the Commonwealth public service and suggests that there are two alternative methods for capping payments other than by age. The first is to set a fixed amount of compensation payable. The alternative is to establish a fixed time period for which compensation payments are available.

If weekly incapacity payments are not capped by age prohibitive costs for compensation schemes may result. This would demand a complete revision of the relatively generous Commonwealth scheme as it exists currently. However, this does not lessen the discriminatory aspect of the legislation.

2.5 Trade union membership

Employers' and workers' organisations should not practise or countenance discrimination in respect of admission, retention of membership or participation in their affairs (ILO Recommendation concerning Discrimination in Respect of Employment and Occupation, clause 2(f), quoted in HRC Report No. 4 1997, page 16).

Although the elimination of discrimination on the basis of age is specified as a principal object of the *Workplace Relations Act 1996* (in section 3(j)), registered industrial organisations are not prohibited by the Act from enacting age discriminatory membership rules.

The Minister for Workplace Relations has released a discussion paper on accountability and democratic control of registered organisations



which includes reference to eliminating discriminatory membership and other rules and calls for comment on measures to address this in legislation. One option under consideration is to provide a mechanism for referral of allegedly discriminatory rules to the Australian Industrial Relations Commission (Ministerial Discussion Paper 1999, page 11). The Minister has also addressed this issue in an exposure draft of the *Registered Organisations Bill 2000*. The bill includes a provision which enables members of organisations to apply to the Federal Court for it to invalidate discriminatory rules of organisations, including discrimination on the grounds of race, colour, sex, sexual preference, age, family responsibilities and political opinion.

ACCI's submission comments that 'there does not seem to be any good reason for age restrictions on union membership' (submission 17, ACCI, page 9).

2.6 Retrenchment and redundancy

These complaints demonstrate an approach to redundancy arrangements that is dismissive of the future employment aspirations and needs of older workers. The approach is based on a perception that, because of their age, older workers do not or should not expect to remain in the workforce and accordingly that they have less to lose than younger workers on separation from employment (HRC Report No. 2 1997, page 7).

Retrenchment and redundancy have a particularly serious impact on older workers as they may find it more difficult than younger workers to obtain new employment. Responses to the discussion paper indicate that some older workers are pressured into accepting early retirement or redundancy.

The Independent Education Union submits that when redundancies are offered to older workers it is often an excuse for bad planning.



To redress this failure in teacher labour market planning, some employing authorities proposed as part of the wages negotiation process, a redundancy package for teachers over 55 as a trade for providing employment to newly graduated teachers ... While the union believes that the industrial parties should explore options which provide opportunities for new and existing teachers to be properly supported at different points in their career, teachers should not be pressured by discriminatory attitudes and practices into accepting a loss in their employment status as employing authorities attempt to make up for their poor planning (submission 12, IEU, page 2).

The IEU also cites examples of teachers who have been pressured into considering retirement because they are seen not to be fit or energetic. For example a teacher who was receiving treatment for arthritis was asked to consider retirement and an early childhood teacher with over 20 years experience was asked by the incoming committee at her centre whether she was 'still up to' the demands of working with young children (submission 12, IEU, page 4). The presumption is that fitness and energy are related to age. However, the IEU contends that teacher stress has resulted from the ever increasing complexity and intensity of teachers' work rather than age.

Kingsford Legal Centre cites the case of a man in his 60s in the publishing industry who had been intending to retire at 65. When he returned to work after an illness, however, he was informed by younger managers that the company wanted to adopt a more 'dynamic' image with a new style. He was strongly encouraged to retire early. The Centre is also aware of cases where workers have been discriminated against because they are not seen as appropriate for youth oriented radio stations or in industries such as information technology (submission 13, Kingsford Legal Centre).

A generous redundancy offer, if truly 'voluntary', may benefit an older worker. However, difficulties arise when workers are pressured



to accept offers or when particular workers are targeted for redundancy and the offers are not made to others who may want them.

The Council for Equal Opportunity in Employment (CEOE) comments that organisations should learn lessons from past restructuring, where valuable organisational history has often been lost when older workers are retrenched. Participants in a CEOE consultation discussed two alternative options for retrenchment rather than targeting individuals. The first is to identify the position and then assess the incumbent's suitability for redundancy; the second is to spill all positions and then have everyone apply based on merit. Whichever process is used, there should always be an option to consider individual cases of hardship or special need (submission 39, CEOE, page 10).

Redundancy packages

Mr Lodolo accepted a package in March 1993. The severance payment constituted 10 weeks' pay plus an incentive of \$2,500. Had Mr Lodolo been under 59 years of age he would have been entitled to a severance payment equal to 40 weeks' pay and an incentive of \$5,000. The difference in the package offered him is \$15,796.00 (HRC Report No. 2 1997, page 27).

Older people have complained to the Commission of discrimination in the monetary value of their redundancy packages. Some packages seem to have been calculated on the basis that older workers are not expected to remain in the workforce and have less to look forward to than younger workers.

Some responses to the discussion paper argue that older workers should receive special consideration in the calculation of their redundancy packages.

Calculation of redundancy packages should not be diminished if a worker is beyond the age of 65. Additional benefits should



be applied to workers over the age of 45 due to the increased disadvantage with respect to employment. Such provisions are allowed under ILO Convention 111 (submission 33, CPSU).

In 1990 the Commission received complaints from three former transport employees who complained that their former employer, a federal government department, was discriminating on the ground of age when determining redundancy entitlements. Certain employees 45 and over were entitled to have their overtime taken in account when calculating their redundancy entitlement. Although the complainants felt that this discriminated against younger employees on the ground of age, the Commissioner was satisfied that it was a special measure of assistance provided for in ILO 111 article 5.2 and scheduled to the *Human Rights and Equal Opportunity Commission Act 1986*.

It is generally accepted and I am satisfied that persons over 45 as a group require special protection or assistance in redundancy arrangements due to their increased difficulties in finding different work and re-skilling. Evidence was put to me that clearly supported this understanding. (HRC Report No. 2 1997, page 50).

The calculation of packages based on seniority of service also raises issues of indirect discrimination against younger workers and against women who often experience broken patterns of work. However, several responses to the discussion paper support the calculation of redundancy packages based on length of service even though this may benefit older workers over other groups. According to the Kingsford Legal Centre,

It is more difficult for older workers to get jobs and they may have passed up other job opportunities while they chose to remain in the same position (submission 13, Kingsford Legal Centre, page 2).



ACCI argues that it is appropriate to recognise length of service in the calculation of redundancy packages. It also submits that whether or not employees are actually offered packages at all on the basis of age does not justify regulation or prohibition as ‘an employee close to the age of eligibility for retirement pensions is clearly in a different financial position to an employee a long way from accessing such benefits’. ACCI argues that this should remain at the discretion of the employer (submission 17, ACCI, page 10).

Taxation on redundancies

One submission on the discussion paper argues that tax treatment of redundancy payments is age discrimination (submission 11, L Gardiner). Under section 27F of the *Income Tax Assessment Act 1936* taxpayers who work past 65 years of age and accept bona fide redundancy will have their payments taxed at the same rate as an Eligible Termination Payment unlike taxpayers under 65 years who, depending on their length of service, receive tax free concessions. Section 27E dealing with Approved Early Retirement and section 27G dealing with invalidity payments also make tax concessions available only for people under 65.

2.7 Compulsory retirement

She does not have a house or any substantial savings apart from superannuation accrued since 1988. She has a good savings plan, but despite this, the time available between when she returned to work [at 62] and 3 years from now [compulsory retirement at 65] is insufficient for her to acquire enough superannuation to cover her retirement needs (submission 43, C Roberts, page 1).

There is no uniform prohibition on compulsory retirement in Australia. It has been abolished in all States and Territories with the exception of Tasmania and Northern Territory. Tasmania is currently



conducting a review of the *Tasmanian State Service Act 1984* to determine whether or not to retain compulsory retirement in the public service.

Elsewhere compulsory retirement has been retained for certain professions such as judges, police officers and fire fighters. For example, in NSW coal and oil shale workers are required to retire at 60 as specified in the *Coal and Oil Shale Workers (Superannuation) Act 1941*. Under the NSW Anti-Discrimination Act there is a general exception for acts done under statutory authority.

Australian Public Service

Compulsory retirement from clerical and administrative positions in the Australian Public Service has now been abolished. The new *Public Service Act 1999* came into effect on 6 December 1999. Prior to that date many complaints to the Commission were received from workers who had been compulsorily retired from Commonwealth employment, many suffering substantial hardships as a result. For these employees, of course, the new Act has come too late. Submissions were also received from several older public servants facing imminent retirement. These submissions illustrate the particular financial difficulties confronting older women who have not had time to accumulate retirement income before the age of 65 (see, for example, submissions 25, S Hutton and 43, C Roberts).

Compulsory retirement is still imposed in some areas of Commonwealth employment, however, most notably in the Australian Defence Force and for the judiciary.

Defence forces

Section 9 of the *Air Force Act 1923* and Regulation 88 of the *Air Force Regulations* compel retirement of officers at varying ages according to rank and position. Similarly, under section 27 of the *Defence Act 1966* and *Australian Military Regulations* 124 and 191, compulsory retirement is specified at various ages for different ranks



of army officers. In the navy compulsory retirement is specified in section 17 of the *Naval Defence Act* and Regulation 102 of the *Naval Force Regulations*.

One Air Force officer feels strongly that his compulsory retirement is age discrimination despite the fact it is specified in legislation and therefore unable to be examined under the age discrimination provisions of HREOCA.

Australia now has two pieces of legislation with opposite requirements: one [HREOCA] precludes almost all employers from exercising age discrimination against their employees, while the other requires a single employer (the ADF) to discriminate against all its employees on the basis of age even though there is obviously no benefit in doing so in relation to a large proportion of those employees (letter to HREOC).

This officer recommends that this ‘anomaly’ be addressed by either eliminating the compulsory retirement provisions of the Regulations or by raising the current age from 55 to a more appropriate age taking into account changes in the nature of defence activities and the improving health of the older population. An alternative could be to transfer older officers to the Commonwealth Public Service rather than compulsorily retiring them from the defence forces.

The defence forces currently require all employees to maintain a standard of health and fitness amounting to combat readiness. It is reasonable to expect that most officers in the defence forces, especially combat officers, need to maintain a level of health and fitness. However, it is arguable that combat readiness should not be required of non-combatant personnel. In any event, the presumption that officers over a certain age will be unable to maintain the high standard of fitness does not appear to have been sufficiently tested. In cases such as *Bradley’s Case*, the Human Rights Commissioner found that the statistical evidence provided did not sufficiently prove that



virtually any person of Mr Bradley's age would be unable to perform his or her duties.

The ADF has announced that it is reviewing non-statutory age restrictions in the forces. However, the statutory provision for compulsory retirement in the forces also needs to be reassessed as part of a general examination of the relevance of age distinctions to current defence force requirements.

Federal judiciary and other federal government appointments

Under the *Australian Constitution* judges of the High Court and other courts created by the Parliament are compulsorily retired on attaining 70 years of age (section 72). Also, judges cannot be appointed to courts created by Parliament if they have attained that age. There is conflict between the principle of non-discrimination and the principle of judicial independence. If judges were not subjected to age-based retirement their capacity would have to be assessed periodically. This would give rise to possibilities of compromising their independence, especially if the assessment were undertaken by the executive or the legislature.

In addition, under the *Workplace Relations Act 1996* (section 16(1)) members of the Australian Industrial Relations Commission are compulsorily retired on attaining 65 years of age.

The government has announced its intention to abolish the compulsory retirement of Commonwealth statutory office holders.

Company directors

The *Corporations Law* also effectively imposes age retirement on directors of public companies. Section 228(1) of the *Corporations Law* prohibits a person who has attained the age of 72 years from being appointed to act as a director of a public company or a company that is a subsidiary of a public company. In its submission the Council on the Ageing states that the requirement is discriminatory and should be abolished (submission 46, COTA, page 3).



Section 228(13) also specifies that a person is incapable of being appointed as a director of a company unless the person has attained the age of 18.

2.8 Superannuation

Because superannuation is designed largely to benefit older people it has an inherent age bias. The overall purpose of superannuation is saving for retirement and related purposes and as a result it has been treated as linked to the pension age and compulsory retirement age. This means that any amendment of superannuation laws to remove age barriers is complex and potentially affects social security, tax and employment law.

Amendments to legislation

A number of provisions in superannuation legislation make age distinctions.

First, the *Superannuation Industry (Supervision) Act 1993* specifies that funds cannot accept superannuation contributions in respect of members after they reach 70 years unless specified in an award. In addition, under the associated regulations, once a fund member reaches 70 years the fund is required to pay out his or her benefits unless the member is still in paid work for a certain number of hours a week.

Second, under the *Superannuation Guarantee (Administration) Act 1992* employers are under no legal obligation to make superannuation contributions for employees 70 years and over or for those under 18 years who are working part-time.

The main cause of concern for older workers is that superannuation restrictions create barriers to continuing employment and hence restrict retirement income security. Several complaints and comments to the Commission from older people outline the frustration experienced by workers not yet retired and over 65 who are unable



to continue to contribute to their superannuation funds. Workers with broken patterns of employment, for example older women or self-employed people, feel that they have not had time to accumulate superannuation sufficient for retirement needs and would like to continue working and contributing to superannuation for as long as possible. With the abolition of compulsory retirement in the Commonwealth public service, the question of age restrictions on superannuation becomes more urgent.

The Urban Local Government Association of Queensland proposes that the *Superannuation Industry (Supervision) Act 1993* be amended to allow Regulated Funds to accept contributions for persons over 70. The *Queensland Local Government Act 1993* provides for a local government to take part in a voluntary superannuation scheme for councillors. However, the Association is unable to join the Queensland Local Government Superannuation Board scheme because of the federal legislation.

Member Councils consider such discrimination is completely unjustified and seek your assistance in having this form of discrimination removed to allow all Councillors, irrespective of age, to take part in voluntary superannuation schemes (submission 16, Urban Local Government Association of Queensland, page 1).

An Institute of Actuaries of Australia (IAA) discussion paper (1999) sets out age differentials considered necessary to achieve the overall purpose of the superannuation system and those which are not (submission 31). The IAA considers that age-based restrictions on the payment of Superannuation Guarantee contributions and the ages by which benefit payments must be made are not critical to the main purpose of superannuation. Neither are the age-based differences in the level of tax deductible contributions critical to the overall aim of superannuation.



The primary aim of these restrictions is effectively to either place limits on the amount of superannuation which can be accrued at various ages, or force superannuation benefits to be paid to members to limit tax deferral (submission 31, IAA, page 2).

With respect to member contributions, the IAA recommends

Any restrictions on member contributions after age 65 should be regarded as discriminatory on the basis of age, unless they are consistent with any legislative restrictions applying from time to time (IAA Discussion Paper, page 10).

However, the IAA notes that age is a significant factor in long-term government retirement planning and that attempts to force the same treatment for both young and old under all circumstances may lead to inefficiencies in attaining the objectives of the superannuation system.

*We therefore believe that any age discrimination legislation should permit differential treatment based on age where it is consistent with relevant Government policy or legislative requirements. (This should **not** [IAA emphasis] be construed as supporting legislation which is discriminatory, rather it recognises that trustees and employers should not be penalised where funds have age based provisions which comply with existing legislation) (IAA Discussion Paper, page 4).*

Similarly, with respect to the Superannuation Guarantee legislation the IAA states that

the restriction of employer contributions or benefit accrual for an employee after a particular age should be considered age discrimination unless required to comply with Federal legislation (IAA Discussion Paper, page 10).

The Association of Superannuation Funds of Australia (ASFA), the peak body representing the superannuation industry, currently



supports the retention of a maximum age cut-off threshold ‘in the circumstances of there being no better mechanism to prevent the development of estate planning rather than income provision’ (submission 27, ASFA, page 5). ASFA does not comment on the lack of any requirement for employers to pay superannuation beyond the age of 70 and below 18 years of age except with regard to award requirements.

However, ASFA does comment on the new sub-regulation 6.21(3A) of the *Superannuation Industry (Supervision) Regulations 1994*. Regulation 6.21 specifies that a member’s benefits in a regulated superannuation fund must be cashed after the member has attained the age of 65 and is not gainfully employed on either a full-time or part-time basis, or has attained the age of 70 and is not gainfully employed on a full-time basis. Full-time employment is defined as 30 hours or more a week and part-time employment as between 10 and 30 hours a week. This rule ensures that those who continue to be employed, although perhaps unable to contribute to a regulated superannuation fund, are able to leave their superannuation in a fund and receive taxation concessions until they are unable to work. Sub-regulation (3A) requires that the fund trustee must make reasonable attempts to keep itself informed about the member’s employment status. If the trustee cannot determine the member’s employment status, the member is presumed not to be gainfully employed.

ASFA considers the rules relating to compulsory cashing of benefits for people who have reached age 65 as complex, inequitable, difficult to apply and not suitable for the modern workforce. The rules as they stand are contrary to the Government’s intention to allow a longer period in which to accumulate an adequate retirement income (submission 27, page 4).



Submissions have also commented on a range of other age-based provisions in superannuation and other legislation. These include requirements for

- preservation of benefits until age 55, although the government has indicated plans to increase this to age 60
- an age-based discount factor in the standard formula for determining minimum defined benefits for Superannuation Guarantee purposes and in various tax legislation
- tax deductions for employer and self-employed contributions based on the age of the member (allowing higher deductible contributions at older ages)
- level of tax on benefits varying according to the age of the recipient (lower rates of tax apply to benefits received after age 55)
- tax deduction available to a pension recipient depending on the age of the member at the commencement of the pension
- minimum and maximum amounts which can be withdrawn from an allocated pension varying with the age of the member each year
- tax rebate attaching to a pension or annuity payment depending on whether the recipient is above or below age 55
- Reasonable Benefit Limits (the maximum benefit limits for which tax concessions are provided) discounts applied prior to age 55.

There may also be a number of provisions in social security legislation which would be affected by any change to superannuation and taxation legislation. These would need to be reviewed for consistency with any such changes.

Several submissions offer detailed recommendations on some of these legislatively based age distinctions, arguing that they are fundamental



to the main purpose of encouraging retirement savings. Some of these are clearly essential to the overall purpose of superannuation, although the specified age may need to be reviewed. For example, the IAA argues that age limits related to the Government's preservation requirements (currently 55 years) are necessary to achieve the overall purpose of superannuation. Other provisions are more difficult to assess and require analysis in consultation with superannuation experts.

National consistency on superannuation legislation

Several submissions support the need for federal age discrimination legislation to eliminate uncertainty for the superannuation industry. For example, ASFA submits that

Currently in Australia there is uncertainty in the superannuation industry as to how to treat age discrimination and this arises from the lack of Commonwealth legislation making age discrimination in the provision of superannuation unlawful (with the exception of the Workplace Relations Act 1996 which prohibits compulsory retirement ages) (submission 27, ASFA, page 2).

ASFA points out the difficulties faced by superannuation funds because of lack of uniform federal legislation.

Age discrimination legislation is by and large State legislation and each State has different provisions which has created much uncertainty for employers and trustees of superannuation funds especially those operating nationally.

ASFA would emphasise that National Consistency is a major point for superannuation and the age discrimination issue and one which deserves attention by HREOC in its current inquiry (submission 27, ASFA, page 2).



Age discrimination legislation varies among the States and Territories in content, scope, interpretation and implementation date. This can cause problems for funds which operate Australia-wide and are multi-jurisdictional as complainants of discrimination may choose the law under which to pursue a claim. It is also unclear whether a fund with members in more than one state must comply with the statutory requirements outside its 'home' jurisdiction. If so, national funds would have to comply with the anti-discrimination laws of all jurisdictions in which they operate as well as federal anti-discrimination laws. The complexities could make this impractical and could be unfair to members and employees.

Ms Anthea Nolan of Arthur, Robinson & Hedderwicks recommends federal legislation which 'covers the field' as the ideal solution while noting that any such legislation would need a clear constitutional basis to achieve certainty.

If Australia is to have a legislative regulation of age discrimination, then it is obviously desirable that there be a single set of rules for all Australians. Uniformity is especially important for national industries such as superannuation (submission 37, A Nolan, page 2).

The IAA also submits that the variation in legislation among the States and Territories creates difficulties for superannuation funds in complying with legislation and recommends federal age discrimination legislation as a high priority.

The IAA also points to two possible alternatives if federal legislation is not introduced.

1. The States and Territories could agree on a common model for anti-discrimination laws affecting superannuation and age related issues.
2. Some basis for employers or superannuation funds to elect to be subject to the legislation of a single specified State or Territory could be established (IAA Discussion Paper, page 2).



Superannuation exemptions

Several submissions emphasise that inconsistency in the application of exemptions to State and Territory anti-discrimination legislation leads to uncertainty within the industry. They emphasise the need for specific exemptions for superannuation in the event of new federal age discrimination legislation (for example, submission 31, IAA and submission 37, A Nolan).

Currently all States and Territories making age discrimination unlawful exempt superannuation to some extent. Most of the exemptions permit age discrimination

- which occurs in the application of prescribed standards under the *Superannuation Industry (Supervision) Act 1993* and Regulations or the *Superannuation Entities (Taxation) Act 1987* (Cth)
- which is required to comply with any other Commonwealth Act
- which is based on actuarial or statistical data on which it is reasonable to rely or, if there is no such data, on other relevant factors or
- which is reasonable having regard to any relevant factors, if none of the above justifications apply.

The *Equal Opportunity Act 1984* (SA) takes a different approach. It has a general exemption in relation to membership and administration of superannuation schemes and provident funds. The *Anti-Discrimination Act 1977* (NSW) authorises the Equal Opportunity Tribunal (now the Administrative Decisions Tribunal) to require the disclosure of the sources of actuarial or statistical data relied on by a fund before granting the exemption.

Ms Nolan submits that, if federal age discrimination legislation is enacted, appropriate and adequate allowances will need to be made for the unique nature of superannuation arrangements, particularly defined benefit schemes.



At an absolute minimum, such legislation should contain exemptions along the lines of uniform exemptions provided under existing State anti-age discrimination legislation. However, a better solution would see the existing exemption framework reformulated to provide a clear exemption for age distinctions which have an accepted superannuation rationale. That is, they ‘make sense’ from a superannuation policy perspective, and therefore are not considered to be ‘discriminatory’ in the perjorative sense (submission 37, A Nolan, page 3).

She contends that, although judicial clarification may occur, litigated solutions are not appropriate in the superannuation context where the issues are common to a large number of funds. She also points out that there is uncertainty in the area of superannuation law as to whether existing exemptions cover all age distinctions and how the exemptions apply in practice. She also expresses a concern that commission and tribunal members have insufficient superannuation expertise to adjudicate on exemption applications.

This becomes a problem in the absence of guidelines on what is ‘reasonable’ reliance on actuarial, statistical or other data. Ms Nolan argues that the trend of the authorities in anti-discrimination cases indicates that the question of ‘reasonableness’ is likely to be assessed without considering ‘legitimate industry standards’.

Thus we have often advised our clients that an age distinction is at risk of being found ‘unreasonable’ as a matter of law even though it reflects an established industry practice and has an accepted superannuation rationale. In other words, the commissions, tribunals and courts may not share the opinion of the superannuation industry as to what factors are relevant to the assessment of reasonableness, or about what is reasonable having regard to those factors (submission 37, A Nolan, page 7).



Ms Nolan suggests that a legitimate superannuation explanation can be offered for each of the following common superannuation age distinctions although there is doubt that they would withstand challenge under anti-discrimination legislation:

- the exclusion or restriction of older members from death and/or disablement cover
- greater contribution flexibility for older members
- ‘gaps’ between resignation and retirement benefits
- discounted early retirement benefits
- age-based default investment strategies
- age-based vesting and accrual scales.

The issue of what is ‘reasonable’ actuarial or statistical data arises in many areas of discrimination law. Insurance is another example.

There is some guidance on what is ‘reasonable’ reliance on grounds other than age in insurance and superannuation. In March 1998 the Commission issued *Disability Guidelines for Provision of Insurance and Superannuation* which give practical guidance on what constitutes discrimination and how to apply actuarial data. In the area of sex discrimination the Commission conducted an inquiry into insurance and the *Sex Discrimination Act 1984* which examined the use of sex as a rating factor for the calculation of premiums in life insurance (HREOC 1990, page 2). Similar clarification of what is ‘reasonable data’ and ‘reliance’ and the principles on which to assess this would be needed if a similar exemption were to be included in federal age discrimination legislation.

The IAA also contends that age discrimination legislation should exempt age-related features based on actuarial or statistical data on which it is reasonable to rely. These include

- benefits with actuarial factors or discounts
- commutation factors for converting pension benefits to lump sums and vice versa
- death and disablement benefits.



However, the IAA makes various recommendations relating to other age distinctions commonly used by funds, including

- member contributions which depend on the age of the member at the time of entry to the fund
- greater flexibility of member contribution given to older members
- gaps between resignation and retirement benefits
- benefit levels
- default investment strategies (IAA Discussion Paper).

The importance of 'grandfathering' exemptions in superannuation, which exempt existing members and/or their accrued entitlements, has been signalled by both the IAA (submission 31) and Anthea Nolan (submission 37). Ms Nolan also suggests that consideration be given to replacing the existing diverse 'grandfathering' exemptions with a uniform exemption for all funds and a specific fund merger exemption.

Ms Nolan also suggests an exemption when individual members consent to arrangements which otherwise might offend age discrimination laws, perhaps subject to appropriate safeguards.





3 Young people at work

3.1 Recruitment

I think a person's ability to perform and participate within the workplace is a better reflection than their age (submission 24, S Honner).

Direct discrimination against young job applicants occurs when, for example, the job advertisement stipulates that applicants should be above or below a certain age even though age is not an inherent requirement of the position.

This presumes that a young person is unsuitable for a position simply because of his or her age. While age often counts against young people in certain jobs for which experience is a genuine requirement, young people may have the ability and skills needed to perform a variety of tasks given the opportunity to prove themselves. Age restrictions deny young people that opportunity. As a result young unemployed people can face the frustrating situation of being unable to gain a job until they have the experience and being unable to gain the experience until they have a job.

Discrimination against unemployed young people is all the more serious considering the precarious nature of the youth labour market.

A near consensus exists about the state of youth employment ... Employment for youth is relatively scarce, increasingly



casual and part-time, fragmented, and dependent upon retail and service industries (AIRC 1999, page 9).

The disadvantaged position of young unemployed people is addressed to some extent in the federal Job Network system. Young unemployed people aged 15 to 20 years have been given special consideration in the establishment of Job Network. They are eligible for Job Network services whether or not they are in receipt of income support. These services include Job Matching, Job Search Training and Intensive Assistance for the most disadvantaged job seekers. In line with the government's concern that young people should be encouraged to complete their final year of high school, Job Network members providing Intensive Assistance are eligible to claim a full outcome payment if they assist a young person aged 15 to 20 years into two semesters of training or education (submission 19, DEWRSB, page 21).

Many comments on recruitment of young people reflect the same concern as for older workers - that age should not be taken into account in assessing requirements for the job.

The employee and their skills should only be considered. Often experience is mistaken as knowledge so that the more years of experience one has the more skilled they are. This is not always true, in many jobs a person with little experience but a lot of willingness can do the job better (submission 9, V Ford).

Decisions based upon age are more likely to reflect misguided stereotypes than ability to do the job. Competency based systems provide an alternative to age as a decider on ability to perform the job. Such systems would include factors such as reliability, punctuality, general life experience, attitude to authority, possession of work ethic, concentration (submission 1, Youth Affairs Council of WA, page 1).



However, the Australian Chamber of Commerce and Industry (ACCI) argues that age is a reasonable proxy for the attributes of skill, maturity, work attitude and experience. It argues that alternatives such as questioning young people about their maturity are not feasible.

In all of the areas identified at the start of this submission, age is used as the most appropriate guide to what could be termed 'maturity'. In general, attributes associated with maturation relate to: responsibility, possession of a strong work ethic, reliability, application, concentration, punctuality, commitment, likelihood of making a long term commitment to the job, general life experience, judgement, attitude to authority and work and diligence (submission 17, ACCI, page 13).

ACCI argues that maturity is a personal attribute not a competency and that it is not contentious that the period of adolescence is a time of growing maturity. It cites literature which describes some typical problems associated with the difficult time of school to work transition including presentation, sense of responsibility, respect for authority, reliability and courtesy, and also literature which shows that the age of the applicant is considered very important for employers in the selection of job applicants.

The lack of such skills, attributes, qualities, characteristics or knowledge differentiates youth from the rest of the labour market, and these factors are associated with lack of 'maturity' (submission 17, ACCI, page 16).

ACCI argues that maturation has been recognised as a factor for consideration in the establishment of wage rates in relation to trainee wages, in particular in the Employment and Skills Formation Council report on the Australian Vocational Certificate Training System,



whose recommendations were then used to develop guidelines for the Australian Vocational Training System. ACCI concludes

- a proxy for maturity is needed in establishing the award rates applicable to young people and the only workable proxy developed to date is age
- it is accepted by all industrial parties that maturity is central to the fixing of appropriate rates for young people (submission 17, ACCI, page 16).

3.2 Junior wage rates

The issue of age based junior rates has been subjected to one of the most thorough and comprehensive reviews by an independent body [the AIRC] ever conducted in relation to discrimination, utility and employment issues. HREOC should accept that this issue has now been reviewed, and that it is not appropriate to again review these issues (submission 17, ACCI, page 12).

Payment should be based on the responsibility and skills required for the job. It is conceivable that in many work force situations a young person could just as competently perform a job as an older worker performing in the same position could. It is also possible that an older person newly entering the workforce will be overlooked for the position simply because their pay rate is higher. If a job requires little responsibility, experience and skill then all age groups working in that position should be paid the same as should jobs that require greater skill and experience levels (submission 4, NSW Young Lawyers Human Rights Committee, page 2).

Many industrial awards and agreements provide for junior rates of pay based solely on the employee's age usually at graduated scales up to age 21. The use of age as a criterion for determining rates of pay



raises the question whether it is discriminatory or justified. Junior wage rates are currently exempt from anti-discrimination legislation.

In June 1999 the Australian Industrial Relations Commission reported the findings and recommendations of its *Junior Rates Inquiry* to consider whether the federal exemption should be lifted. Key findings were

1. none of the alternatives to junior rates presented to the Commission were 'feasible', although the inquiry did not rule out the existence of alternatives
2. an immediate and general removal of the existing junior rates would have a detrimental affect on youth unemployment
3. well-designed junior rates may justifiably be used for creating or protecting employment opportunities for young employees.

Following release of the AIRC report, the *Workplace Relations Act 1996* was amended to exempt junior rates and certain types of trainee wages permanently from scrutiny under the Act's anti-discrimination provisions. At the same time new objects were introduced dealing specifically with youth employment and unemployment. The Act further enables junior rates to be introduced, removed or varied on a case by case basis, including during the award simplification process.

The submission from DEWRSB to the HREOC inquiry argues that junior wage rates should be exempt from any age discrimination legislation because the amendments were passed with bipartisan support and the support of the AIRC. In addition, every State and Territory government has exempted junior rates (submission 19, DEWRSB, page 25).

The Council for Equal Opportunity in Employment (CEOE) survey of members' opinions on age discrimination revealed a cross section of views.

Members predominantly from the retail and services industries strongly supported the continuing use of junior wage rates.



Across other industries however, the rationale for junior wage rates is less clear (submission 39, CEOE, page 13).

The CEOE submits that jobs paying junior rates tend to be part-time or casual and have a high turnover because many people use them as a stepping stone to something else or to support themselves while they are studying. CEOE members agreed

the broader and more pressing issue is not so much whether or not to have junior wage rates as the inequitable social and financial implication for younger people as a result of inconsistencies in the definition, and use of the term 'adult' (submission 39, CEOE, page 13).

Many submissions acknowledge the decline in the youth labour market but criticise the reliance on junior rates as the solution.

The government's case for retaining junior rates is based on the claim that without it there is potential to lose 300 000 jobs for young people. Claims of mass sackings of young workers and increased levels of unemployment if youth wages were abolished are completely unsubstantiated and being used as scare tactics. It is interesting to note that the Mitsubishi Motor company abolished junior rates as they found that age is irrelevant to the issue of productivity in their workforce (submission 14, Youth Affairs Network of Queensland, page 12).

A number of submissions argue that junior wages are discriminatory. Kingsford Legal Centre comments

Equal pay for equal work is a fundamental human right. Ultimately, the idea of a 'youth' wage disguises the fundamental fact that it is the employer who benefits the most from such arrangements, by being able to pay a wage that is less than for most adults (submission 13, Kingsford Legal Centre, page 20).



The Centre also points out that article 7 of the *International Covenant on Economic, Social and Cultural Rights* obliges Australia and other State parties to ensure that everyone has the right to ‘fair wages and equal remuneration for work of equal value without distinction of any kind’. Further, article 27 of the *UN Convention on the Rights of the Child* requires State parties to address the ‘right of every child to a standard of living adequate for physical, spiritual, moral and social development’ (submission 13, Kingsford Legal Centre, page 2).

The Youth Justice Coalition submission adds that youth wage rates violate the principle of equal pay for equal work as guaranteed in the *Universal Declaration of Human Rights* (article 23.2). In addition it contends that junior rates may amount to economic exploitation of young people who are more likely than other workers to lack bargaining power. In its view junior rates are defensible only if there is strong evidence that

- a) youth wages assist young people gain meaningful and non-exploitative employment
- b) rates of pay are tied to experience rather than age and lead to a career path and
- c) employers invest in the future of their young employees (submission 45, Youth Justice Coalition, page 2).

The NSW Young Lawyers Human Rights Committee submits that junior wage rates should be abolished and wage rates should be based on the class of work being undertaken rather than age. It outlines three concerns with junior wage rates.

1. Junior rates reflect an outdated view of the workforce, that a person may possibly spend the entire working life with the same employer benefiting from promotion and permanent employment. The modern workforce is less secure and there may be little prospect of advancement.



2. Junior rates for 18 to 20 year olds are no longer justifiable in a society where for all other purposes an 18 year old is an adult.
3. There is not enough evidence to prove that junior rates of pay lower unemployment rates for young people and in the meantime young people are paid less for equal work (submission 4, NSW Young Lawyers Human Rights Committee, page 2).

The Youth Affairs Council of WA (YACWA) contends that the federal government focus in junior rates has been almost solely on perceived individual deficiencies rather than on the structural factors which are driving the decline of the youth labour market. Young people are legally discriminated against (submission 1, YACWA, page 2).

The Youth Affairs Network of Queensland (YANQ) also notes that, regardless of whether junior rates are beneficial to young people or not, young people have had little say in decisions about their pay levels.

While it is easier to shift the responsibility of youth onto the shoulders of young people, the fact is that youth unemployment is largely a consequence of the actions and policy decisions of governments, industry and the broader community. Young people have little say in these arenas (submission 14, YANQ, page 11).

The National Children's and Youth Law Centre (NCYLC) argues

Certainly, the retention of the current system on the basis that any change would result in unemployment is idiosyncratic. Indeed, research conducted by the Australian Youth Policy and Action Coalition contradicts this argument in that figures show that while the wages of young employees have fallen over the past twenty years, youth unemployment has increased (Schetzer, Payne and Scher 1999, page 8).



NCYLC disputes the argument that removing junior rates will mean jobs currently held by young people will go instead to older workers.

While this has been a long held belief, there is no evidence to show that adult capacity and productivity in a particular industry is greater than that of young people. Employers inevitably want the best person for the job. As such, if given a chance to choose between an adult with little skills and a youth with skills, the employer would choose the youth notwithstanding that they would need to pay adult wages. Therefore the development of a skills-based alternative is a feasible alternative to junior wage rates, particularly if the junior rates meant 15-18 years rather than 15-21 (Schetzer, Payne and Scher 1999, page 10).

NCYLC argues that ‘the whole issue of youth wages needs to be revisited with some positive steps taken to address the problem of youth unemployment, such as skills-based competency courses and assistance to employers for an initial period when employing youths at adult wages’ (Schetzer, Payne and Scher 1999, page 11). In addition, NCYLC notes the anomaly that a young person of 18 years is usually considered to be legally an adult yet most awards contain junior rates for those up to the age of 21.

YACWA also argues that junior rates highlight the inconsistency of age limits for young people.

We seem to be faced with a variety of different points for different things when a ‘young person’ becomes an ‘adult’. Legally a young person is an adult at 18. Therefore they could, if not discriminated against, expect to be treated as an adult at that age in every way - access to social security benefits, equal rates of pay, equity in access to employment - in short to be treated consistently (submission 1, YACWA, pages 2-3).



3.3 Termination of employment

I have heard many anecdotes of young people being put off from a work place once they turn 18 as it then costs more for them to be employed. Ability to perform duties within the workplace are a much more equitable indicator than age (submission 1, YACWA, page 1).

A number of submissions raise the problem faced by young workers who find that they are considered 'too old' by employers once they are entitled to adult wages. An ex-CES worker writes that while he worked at the CES he came across young people paid junior wages who then lost their jobs when they reached a certain age.

Most had left school for a low paid job, only to be dismissed when they qualified (on the basis of age) for higher pay. Though highly skilled, their skills were neither transferable nor useful; at their age. Few returned to education. Many (in an area of high unemployment) never worked again. They were regarded as too old to start over and lacked the skills for the jobs available for those in their age bracket in that area. It is probably no coincidence that most were female (submission 2, D Boxall, page 1).

X also makes it uncomfortable for older workers to continue working and they do not give them shifts on Sundays or public holidays, preferring instead to employ only 15 year olds on these costly days (submission 9, V Ford, page 5).

The *Workplace Relations Act 1996* makes unlawful the termination of employment on the ground of age. However, section 170CC of the *Workplace Relations Act 1996* provides that the *Workplace Relations Regulations* may make exclusions for various classes of employees from the operation of termination of employment provisions. Regulation 30B excludes short-term casual employees (less than 12 months employment) and other categories of employment from both the unfair and unlawful dismissal provisions which prohibit termination



of employment on the ground of age. As the submission from DEWRSB points out, under Regulation 30B(3) an employee engaged on a regular and systematic basis over a period of at least 12 months with a reasonable expectation of continuing employment is not a 'casual' engaged on a short-term basis (submission 19, DEWRSB, page 25). Nevertheless, short-term casuals are not comprehensively protected from age discrimination. Many short-term casual workers are young people.

3.4 Harassment and ill-treatment

Young men and women in these types of situations were unlikely to complain for fear of harassment getting worse and/or losing their job – which would have been difficult to secure and even more difficult to replace (submission 39, CEOC, page 14).

A number of submissions comment on the prevalence of workplace harassment and ill-treatment of young people. This is especially the case for apprentices and trainees.

As a former employee of X, where I worked part time for 2½ years while at school, I have experienced much discrimination as a young person. The discrimination at X is subtle, young people think that the Managers are just mean, yet looking back on the way young employees were treated I think you could definitely call it discrimination. Older workers would never be treated the way that young workers at X are, nor would they stand for it.

There was a shift called 'close' which involved cleaning up for the night and staying back for 1/2 hour after the store closed to continue cleaning up. However, if the store had been busy that night, or the others working with you did not help, you would have to stay back later to clean. You were not paid for this extra time you put in, which could sometimes be an



hour or more ... if a young worker did something wrong they could be dismissed, all on the whim of the Manager on duty. There were no clear penalties (submission 9, V Ford, page 5).

Some harassment is violent.

ACCI has itself publicly expressed the strongest concerns about a number of cases of mistreatment of apprentices. It is important that young employees are not subjected to assault or physical intimidation in the workplace, and the overwhelming majority of the private sector, and the Australian community generally, would be very strongly of that view (submission 17, ACCI, page 18).

Workplace harassment may amount to age discrimination. Many young people are the targets of violence in the workplace merely because they are the youngest person in the workplace (submission 13, Kingsford Legal Centre, page 2; see also submission 45, Youth Justice Coalition, page 8).

ACCI suggests that organisations should take seriously their obligations to stamp out this type of harassment and should do so through internal policies and disciplinary procedures appropriate to the size and type of business.

On the other hand, Nissan Motor Co. (Australia) acknowledges that harassment because of age exists and suggests

School programmes need to be more closely linked with work experiences to gain work skills. Employers also need the incentive to provide young people with the opportunity to work. In addition, federal legislation which prevents harassment based on age would assist, although the general discrimination in employment legislation should cover this type of harassment including any 'bullying' behaviour (submission 44, Nissan Motor Co., page 3).



4 Other discrimination

Age discrimination occurs in a wide range of areas other than employment. These include the provision of goods and services, access to accommodation and clubs, provision of health care, insurance and superannuation and a range of government programs. Inaccurate and unfair assumptions about the behaviour and abilities of both younger and older people can deny them access to essential services.

In this chapter we review the reliance on age distinctions as eligibility criteria in a sample of Commonwealth laws: *Social Security Act 1991* and *Migration Act 1958* and *Regulations*. The chapter concludes with a review of some of the areas in which Australians experience age discrimination but which are either inconsistently covered or inadequately addressed by State and Territory anti-discrimination legislation.

4.1 Income support for young people

These recent changes to income support for young people are based on assumptions that young people can rely on their families for support or that they require less income than other individuals simply because they are young. Essentially, the construction of Youth Allowance sends a message from government and community to young people – We don't value



you! (submission 14, Youth Affairs Network of Queensland, page 11).

The safety net of income support is perhaps the most critical essential service provided by the federal government. A number of payments administered by Centrelink have age as an eligibility criterion:

- Age and Disability Pensions
- Newstart
- Parenting Payment, Family Allowance and Assistance for Isolated Children
- Sickness, Mature Age, Widow and Youth Allowances
- Austudy and Abstudy.

A number of submissions on the HREOC discussion paper question whether age limits in Centrelink payments to young people adequately reflect their need for income support.

The Mental Health Legal Centre expresses concern that the Disability Support Payment for people under 21 years of age is less than that for people 21 and over.

The Centre firmly believes that social security benefits should be the same level for all Consumers, albeit only 27% of Average male earnings. The Senate is currently looking to investigate age disparities in payments for young workers and we believe Social Security is just as important an issue (submission 42, Mental Health Legal Centre, page 4).

Several submissions also criticise age distinctions in Youth Allowance payments. Youth Allowance is calculated differently for young people dependent on their parents and those assessed as independent. Instead of assessing each individual situation, the Allowance presumes that people in certain age groups are dependent.

The NSW Young Lawyers Human Rights Committee comments on the 'artificial definition of independence' under all income support



schemes for young people. In particular, the Committee considers that the differing independence age for students and job seekers is unjustified. For example, a young unemployed person aged 21 is treated as independent whereas a full-time student aged 21 is presumed to be dependent on his or her parents unless they prove otherwise.

[This] may place an untenable financial burden on parents who are still responsible for their studying adult children. There is also the possibility that financial pressure may force young people who would be eligible for Newstart [now Youth Allowance for job seekers] but not Austudy [now Youth Allowance for students] to leave full time study or to defer their study until they are older (submission 4, NSW Young Lawyers Human Rights Committee, page 1).

The Child Support Scheme assumes independence at the age of 18, which means that a situation could arise where a parent with whom a young person does not reside is no longer required to pay child support but the young person is not eligible for Youth Allowance, placing the entire financial burden on the parent with whom the child does reside.

The NSW Young Lawyers Human Rights Committee recommends that the age of independence for the various Commonwealth income support programs be standardised by

- a) *reducing the age of independence to say 18*
- b) *reducing the age for independence to say 18 with a category of lower payments for those young people living with their parents up to a determined age (subject to parental means test)*
- c) *formulating a sliding scale for independence say between the ages of 18 and 21 (submission 4, NSW Young Lawyers Human Rights Committee, page 1).*



The Youth Justice Coalition also comments that age distinctions in Youth Allowance fail to take account of the reality that many young people are financially independent of their parents. Also the Allowance is at odds with the Family Allowance and Child Support which assumes that a child will be financially independent at 18.

The current Youth Allowance regime discriminates against young people because it does not allow them independence and control over their lives. It is unthinkable that older Australians should be forced to be dependent upon their families in this way (submission 45, Youth Justice Coalition, page 3).

The Youth Affairs Council of WA (YACWA) criticises the level of income support payments for young people as inadequate and below the poverty line, at the same time as eligibility criteria have been tightened and obligations imposed on beneficiaries have increased.

Low payment levels leave many young people, especially those living away from family, in poverty and having difficulty securing basic necessities. The introduction of a parental means test led to thousands of young Australians aged 18-20 having their payments reduced or cancelled. Even the highest payment is well below the Henderson poverty line (submission 1, YACWA, page 2).

YACWA submits that the system further discriminates on the basis of age by paying a young person less than a person over 21, despite the fact that living rent, clothing, food and other essentials cost the same.

The Youth Affairs Network of Queensland (YANQ) also argues that the Youth Allowance discriminates against young people at various ages.

The changes in payments for 16 and 17 year olds have resulted in young people being forced to return to school or lose their



benefit, placing education systems under stress, not to mention the stress for the many young people for whom mainstream education does not suit. 45 000 young people aged 18-20 have had their payments reduced or cancelled, largely due to the introduction of the parental means test for this age group receiving a job search payment (submission 14, YANQ, page 11).

4.2 Work for the Dole

Discrimination against young unemployed people who are perceived as 'dole bludgers' has also resulted in the introduction of punitive measures such as the Dole Diary and compulsory Work for the Dole schemes (submission 14, YANQ, page 11).

Several submissions comment on the Work for the Dole program which requires young job seekers who satisfy certain criteria to work on community projects for 12 to 15 hours a week in exchange for receiving unemployment benefits. This applies to

- 18 to 19 year-old Year 12 school leavers who have been receiving Youth Allowance as a job seeker for three months or more
- 18 to 24 year-old job seekers who have been receiving Newstart/Youth Allowance for six months or more
- and, more recently, 25 to 34 year old job seekers who have been receiving Newstart Allowance for 12 months or more.

In addition, other job seekers 18 or over can volunteer to participate in Work for the Dole.

The Youth Justice Coalition is concerned that compelling young people to perform certain types of work in exchange for income support reinforces the stereotype that young people would rather



not work. This ‘obscures the sad reality of youth unemployment’ (submission 45, Youth Justice Coalition, page 3).

The Youth Affairs Network of Queensland argues

Attempts to address the issues of youth unemployment have been introduced within a framework which appears to have ‘shifted the blame’ from the inability of government programs and industry structures onto young people, for their inability to gain employment, Work for the Dole schemes suggest that young people owe some responsibility for not being employed (submission 14, YANQ, page 12).

Work for the Dole schemes are not recognised training schemes and do not provide young people with qualifications or trades.

4.3 Income support for older people

The income support system needs to recognise that many older people have little or no capacity for generating income through paid employment or other means for the rest of their lives (submission 46, Council on the Ageing).

A number of submissions argue that it is reasonable to have age-based requirements for the age pension. Kingsford Legal Centre states that the allocation of government welfare and health services may be justified where the needs of particular age groups are targeted.

Following the abolition of mandatory retirement some people will choose to work for longer. It should be recognised however that many, perhaps the majority of people in the community do not wish to keep working in the latter part of their life and they should not be forced to do so by virtue of economic necessity. The provision of a means tested pension for older people can be justified by a number of factors including maximising the distribution of employment among those in



the population who have requisite abilities, showing respect for people who have given many years of their life to working and paying tax. Retirement usually brings with it a significant drop in income and we have a responsibility as a community to ensure that older people are not living in poverty. It should not be illegal discrimination for the government to make special allocations to those in need (submission 13, Kingsford Legal Centre, page 3).

The Department of Family and Community Services comments that the pension is broadly consistent with the qualifying ages for retirement benefits in other countries and reflects the intention of the Commonwealth Parliament. According to the Department the qualifying age for the pension was not set by reference to life expectancy or health but rather according to the age that the community saw as ‘old’ and at which point working becomes difficult. The Department comments that it is also a useful proxy for ensuring that all Australians have an adequate income.

Although age may appear to be an arbitrary indicator of a person’s capacity to work, it provides one easily administrable, non-intrusive and currently socially acceptable way of determining who can and cannot reasonably be expected to pursue employment. The income and assets tests then determine if the person needs income support (submission 29, Department of Family and Community Services, page 2).

The Department points out that the government does not advocate or presume a retirement age as such. Rather, in its retirement income policy the government envisages a range of possible retirement ages, from 55 years (the current superannuation preservation age) to 70 years (the age up to which people can contribute to superannuation).

Providing an age pension at age 65 for men and 61.5 for women recognises that people are less likely to work after a certain age but it does not compel them to retire. In many ways the structure



of the Australian age pension lends itself to a gradual work to retirement transition (submission 29, Department of Family and Community Services, page 4).

The primary objective of the pension is poverty alleviation not income replacement. As it is a safety net, the Department claims there is no financial incentive for someone to cease working on reaching pension age. The pension means tests are structured to provide incentives or 'rewards' for people who can help fund retirement from their own private income or assets, as the pension is tapered to ensure that if a person has some private income the total retirement income will be greater than the age pension alone.

However, several commentators criticise the disparities in payments and related benefits between the age pension and other pensions, in particular the differences between the treatment of self-funded retirees under 65 and those on the age pension.

One submission argues that the disparity in the amount payable to a retiree over 65 and that payable to someone unable to work under 65 is discriminatory (submission 38, A Oakes). Mr Alan Oakes argues that a couple over 65 receiving an age pension are allowed up to \$381,500 in assets before it affects their payments. For couples aged 55 to 64, however, the allowable assets are as low as \$178,500 before income support payments (unemployment benefits) are affected. Age pensioners are also eligible for Seniors Health Cards and the pharmaceutical allowance.

Mr Oakes argues that, if a person is actively seeking work, then superannuation assets 'should be able to remain rolled over' until that person attains 60 years of age. If an older person is deemed to be retired then he or she could receive the Mature Age Allowance (for unemployed people over 60) which applies the same asset restrictions as the Age Pension.



I have saved all my working life to accumulate superannuation and currently have about \$200,000 in a rollover fund. I cannot find employment and I am soon to be 55. I believe that I deserve the equal opportunity to live at the same standard as someone who chooses to retire at 65 and has received an identical superannuation payout as myself (submission 38, A Oakes, page 3).

This is supported in a submission by another self-funded retiree, aged 58 (submission 55, H A Zirkee). Mr Herman Zirkee also points out that early retirees do not qualify for the same amount of GST compensation as retirees over 65. An Aged Persons Savings Bonus of \$1,000 will be paid to people aged 60 and over from 1 July 2000 to offset the effects of the GST but will not be available to self-funded retirees under 60. Although they will be eligible to receive up to \$2000 Self-Funded Retirees Supplementary Bonus, a self-funded retiree over 60 may be eligible for both as long as he or she is not in receipt of income support payments.

Again I note discrimination against self-funded retirees ie. NO AGED PERSONS SAVINGS BONUS OF UP TO \$1000. Only those who have reached the magic age of 60 may be eligible (submission 55, H A Zirkee).

A submission from Mr D Clark, a retired ship's engineer aged 67, expresses the view that the pension should be viewed differently from other income support and should not have income and assets tests, which discourage him from finding temporary employment. When Mr Clark finds temporary employment for six weeks, he loses his pension and yet, when the employment terminates, he has to wait weeks before its resumption. This discourages him from pursuing employment.

At every turn people in my situation are hamstrung by bureaucratic red-tape with imposition of 'Assets and Incomes' tests which make no mistake, was introduced in the first



instance to limit and eventually deprive people of their rightful dues namely retirement pensions, which we have contributed to throughout our working lives (submission 5, D Clark, page 1).

On the other hand, others comment that need rather than age should be the essential guiding principle for social security payments and concessions.

All situations should be assessed on a case-by-case basis. Circumstances of need are more important than age (submission 3, K Brennan).

Social Security income support should be based on need. Age is overused as an indicator, probably because of laziness. We can do better (submission 2, D Boxall, page 1).

Some submissions point out the disparity between benefits received under the Disability Support Pension (DSP) and the Age Pension. This affects older people with disabilities who are automatically transferred from the DSP to the Age Pension on reaching pension age. The Department of Family and Community Services comments that, although DSP recipients are generally automatically transferred to the Age Pension on reaching pension age, the recipient's circumstances are taken into account and the best option in terms of rent assistance and the education supplement are considered. Pensioners have the option of being transferred back to DSP within three months of any automatic transfer to the age pension (submission 29, Department of Family and Community Services, page 3).

Hobart Community Legal Service argues that the *Social Security Act 1991* should be amended to ensure that people entitled to certain pensions are not refused simply on the basis of age rather than need. It describes the case of Mrs X, aged 64 and a New Zealand national, who moved to Australia with the intention of becoming a permanent resident. As she had been receiving a DSP in New Zealand, under



the Australia/New Zealand Social Security Agreement 1991 she should have been able to claim the same benefit here. However, she was refused a benefit on the basis that her claim for a DSP was made after she had attained her prescribed pension age. As she was over the pension age for women in Australia she was forced to rely on charity until she became eligible for an overseas pension (submission 30, Hobart Community Legal Service, page 1).

Ms Marie Friswell, an age pensioner undertaking studies, submits that she is discriminated against by not being paid a textbook allowance while in receipt of an Age Pension. Ms Friswell is studying a diploma at TAFE. Although Centrelink offered to lend her up to \$500 out of her pension, to be paid back over 6 months, there is no textbook allowance for age pensioners.

At 65 years I have at least 25 more very active years ahead of me. Re-education is my choice that will keep me mentally stimulated, in good health and as a preventative measure will save the government a tidy sum of money seeing I am going to be around until I am ninety (submission 10, M Friswell, page 1).

4.4 Immigration

The assumption that just because a person is over 45 years old they will have difficulty finding work may result in Australia missing out on the skilled and valuable labour of many people aged over 45 years old (submission 24, S Honner).

Some visas and immigration programs are age-related. For example, working holiday visas are restricted to applicants aged 18 to 25 (30 in certain cases) and skilled migrant visas to applicants under 45.

Why should those wishing to spend time in Australia on a working holiday be aged between 18-25? Any restrictions in



the law related to age must be related to provable facts rather than theories such as that older people would be more likely to outstay their visa if working or that they are less likely to want a working holiday visa (submission 13, Kingsford Legal Centre, page 30).

The NSW Young Lawyers Human Rights Committee recommends that the age qualification for the Subclass 126 (Independent) program be removed as it reflects the inherent discrimination towards older workers in the economy.

The government should be setting the standards in the Australian economy so that age is not seen as a determinative factor in a worker's contribution. The government should be consistent: if age discrimination is not tolerated in Australia (as per international conventions) how can it be tolerated in the migration program? (submission 4, NSW Young Lawyers Human Rights Committee, page 3).

4.5 Health care

Everyone, regardless of age, has the right to enjoy the highest attainable standard of physical and mental health (*International Covenant on Economic, Social and Cultural Rights* article 12). With a rapidly ageing population, access to health services is becoming a pressing issue for Australia.

Health care resources are increasingly the focus of public debate. Age should not be the criterion for deciding who should receive treatment. Discrimination on the grounds of age in the provision of medical services may be a ground for a complaint under the EOA and should be included in any Federal age discrimination legislation (submission 32, Office of the Commissioner for Equal Opportunity (SA), page 15).



Health services are not exempt from State and Territory anti-discrimination legislation. However, there is some confusion whether doctors should be able to make assumptions about treating a patient because of age. Both younger and older people need to be aware of their rights to access health care without discrimination.

Many older people in particular feel that they are discriminated against in accessing health care services, although this can often be subtle and difficult to identify. Several submissions express concern that the level of funding of aged care services, or of treatment for the elderly within other services, is insufficient and therefore indirectly discriminatory against older people. Inadequate access to health services and aged care services is even more severe for older people living in rural and remote areas.

The Mental Health Legal Centre points out that aged psychiatric services are among the most poorly funded.

A society that determines access to service on guidelines of the dominant ideological group will disadvantage those who are at its extremes. Thus the Centre would strongly oppose any weighting of services that denied the elderly equal treatment (submission 42, Mental Health Legal Centre, page 4).

The manner in which elderly people in care are treated was also raised as a human rights issue.

To date, far too many facilities use physical or chemical restraint, rather than exploring principles of best practice in dementia care as a means of minimising the need to use restraint (submission 26, Alzheimer's Association of NSW, page 1).

Those Consumers who are younger and Older are particularly vulnerable to harassment especially where age related (dis)orders such as Dementia affect how people are treated



in their homes and institutions such as special accommodation services (submission 42, Mental Health Legal Centre, page 3).

The aged and frail need special care and protection and for this reason there may be a need to maintain age qualifications for entry to certain types of health care.

The concern being that currently age is not a discriminatory factor in relations to the admission of people to nursing homes and hostels etc. Therefore we would be anxious [if] the law demands that agencies such as Resthaven have to service all ages using age-specific resources provided by government (submission 20, Resthaven Inc., page 1).

4.6 Accommodation

Both young and older people can face difficulty in securing and retaining accommodation.

In our experience real estate agents have criteria for 'good tenants' which are quite stereotypical in nature and tend to discriminate against the young or elderly. Young people are assumed to be likely to not pay the rent or to skip out on the lease or to damage the property (submission 13, Kingsford Legal Centre, page 4).

The Youth Affairs Network of Queensland points out that, because young people have low incomes, private rental accommodation can be prohibitive. Yet young people may not be eligible for public housing.

For young people in low incomes or income support, typical rents for very basic, one bedroom housing could be expected to absorb up to 70 per cent of income (submission 14, YANQ, page 9).



In Queensland existing policy states that all people aged 18 and over may apply for public housing. Young people under 18 with children can apply but young people under 18 without accompanying children are not eligible for public housing. This is despite the Commonwealth-State Housing Agreement stating that assistance will be provided on a non-discriminatory basis to all sections of the community (submission 14, YANQ, page 9).

There is no legal reason that people under 18 years of age cannot sign a lease, however this is still cited as a reason for them not being leased flats, units and houses (submission 1, YACWA, page 3).

The Youth Affairs Network of Queensland points out that the perception that young people cannot enter into a contractual relationship results in discrimination. In fact, if a young person is being supplied with necessary goods and services required to maintain an appropriate lifestyle, including clothing, lodging, medical services and legal advice, a valid and enforceable contract can be concluded despite the person being under 18. Lessors are still unwilling to rent to young people, either because they are ignorant of the law or because they make presumptions that young people will be unreliable tenants (submission 14, YANQ, page 4).

The Youth Justice Coalition agrees that in many cases the reason for refusing to lease properties to young people is a discriminatory perception that young people are unreliable, noisy or likely to damage property, rather than being incapable of entering into a contract. Another aspect is the lack of legal protection provided to people living in share housing, which indirectly discriminates against young people who, often out of financial necessity, are more likely to adopt this form of accommodation (submission 45, Youth Justice Coalition, page 4).

The NCYLC receives many complaints from young people who seek to enter into residential tenancy agreements.



A 16-year-old girl left home due to a violent family situation. She works full time and has the financial capacity to live independently. She applies to rent many private rental properties, but is refused every time. She is told by one real estate agent that she must have a guarantor in order to rent because she is under 18. When she obtains a guarantor she is told that he is not sufficient because the guarantor will not be living with her in the house (submission 53, NCYLC, page 2).

Older people also face difficulty obtaining suitable housing in the private rental market. In public housing, some age restrictions discriminate against certain older people.

The Centre has advised older clients who were unable to obtain public housing in New South Wales as they did not fit the stated criteria in terms of age. There are certain cut off points related to age in the housing policy guidelines and we have heard of informal policies relating to allocation of priority housing where the applicant is required to be over 80. If Australian males have a life expectancy of 75.2 years this policy on the face of it is discriminatory in a number of areas (submission 13, Kingsford Legal Centre, page 3).

Kingsford Legal Centre recommends that accommodation should be covered by federal age discrimination legislation. However, the Centre submits there should be an exception for accommodation designed for particular age groups such as retirement villages or specifically targeted youth accommodation (submission 13, Kingsford Legal Centre, page 5).

4.7 Insurance

Insurance companies use age to predict the likelihood that a claim will be submitted, especially for motor vehicle, travel, disability, personal accident and life insurance policies. Some companies may refuse insurance because of assumptions about risk based on statistical



evidence. More commonly, the cost of premiums differs according to the age of the insured. State and Territory anti-discrimination legislation exempts age distinctions in insurance provided reliable actuarial or statistical data support the differentiation.

Some submissions dispute the accuracy or fairness of this exemption for distinctions based on statistical data.

These are often based on assumptions of when a person will generally leave the workforce as well as on data which may easily become out-dated. Many individuals whose situations are not adequately reflected by these assumptions may therefore face discrimination (submission 24, S Honner).

Health insurance, on the surface, seems similar to life insurance. The older we are, the more likely we are to fall ill. There is one fundamental difference, however. As time passes, medical technology progresses. Possibilities expand and costs increase. The dynamics are such that it would not be possible for an individual to accumulate the (insurance) resources to pay for the treatment necessary to see them comfortably through old age. Costs inevitably increase beyond the foreseeable. Market failure is unavoidable. The only viable solution is for current generations to bear the costs of treating the old (submission 2, D Boxall, page 2).

Insurance companies should not be allowed to refuse people insurance on the basis of actuarial or statistical data. The Centre believes that those insurance companies must make decisions based on a case by case situation with relevant medical data and reports (submission 42, Mental Health Legal Centre, page 5).

The Institute of Actuaries of Australia (IAA) considers that it is not discriminatory to base insurance premiums on age if



the cost of providing an insurance product is dependent on the age of the insured. It is essential for the financial soundness of the provision of voluntary insurance that premiums (and/or policy terms) be permitted to vary according to variations in factors which affect the risk, which include the age of the insured (submission 31, IAA, page 3).

Several submissions raise the issue of age discrimination in access to voluntary work due to insurance restrictions (submission 21, H J Holcombe and submission 46, COTA). There are significant benefits attaching to the participation of older people in voluntary work, both for older people and the community. For older people volunteering can re-invigorate social contact and alleviate boredom. It is also an important route back into paid employment (COTA submission to the House of Representatives inquiry, page 17).

In one case, a group of retired workers in a small country town offered to assist the state government to keep their railway station open by volunteering to build up the existing platform to the required height. However, their offer of voluntary assistance was refused because, due to their age, they could not be covered by the government's insurance provisions (submission 21, H J Holcombe).

Voluntary work in particular enjoys only limited protection in State and Territory anti-discrimination legislation.

4.8 Financial services

Both younger and older people face difficulties in accessing financial services, including loans and even the everyday use of banking facilities.

Kingsford Legal Centre suggests that a federal age discrimination act should include goods and services and particularly financial services as they have heard from a number of young clients who have been discriminated against in respect of obtaining credit or loans (submission 13, Kingsford Legal Centre, page 5).



Older people may have difficulty accessing electronic banking and payment systems. One submission considers it discriminatory that banks charge people who use the teller service rather than the ATM because they cannot see the ATM screen, cannot remember their PIN number or cannot manage the buttons (submission 47, Hobart City Centre Congregation, page 2).

4.9 Concessions

Both younger and older people receive a variety of concessions from private companies and governments, for example in cinemas, transport and travel packages. Concessions are often justified as 'special measures' of assistance for a disadvantaged group.

Ms Vanessa Ford comments about bus concessions. She points out that although a local bus company offers concessions to full-time university students these are not available to mature-aged students over 30 such as herself, even though she relies on government student allowances and is unemployed. She also comments that some bus companies only make concessions available to school students under 15, presumably on the now out-dated assumption that 16 and 17 year olds are more likely to be in employment.

I think this demonstrates the need for concessions to be based on status or situation rather than these arbitrary ages (submission 9, V Ford, page 5).

Kingsford Legal Centre supports concessions by reference to age because 'statistical data would show that these two age groups are the most financially disadvantaged in terms of age groups in the community' (submission 13, page 4). The Youth Justice Coalition comments that young Australians are in fact likely to face financial hardship and that age-based concessions reflect this reality (submission 45, Youth Justice Coalition, page 7).



Often it is assumed that just because a person is of a certain age then they are of a certain financial situation and therefore they receive the relevant concessions according to their age. There may be other ways to determine whether someone is eligible for concessions that better reflect their situation than age does (submission 24, S Honner).

The SA Equal Opportunity Commissioner writes

It is my view that the issue of age criteria for concessions needs to be looked at against the background of the social purpose that such concessions are intended to serve. If the purpose is to address financial disadvantage faced by older and younger persons, then in my view concessions should be based upon financial disadvantage only rather than age criteria (submission 32, Office of the Commissioner for Equal Opportunity (SA), page 16).

4.10 Other age inconsistencies

A number of comments on the HREOC discussion paper recommend more consistency as to the age of majority of young people. Age limits, some designed to ‘protect’ the child and others to ‘protect society’ from the child, vary considerably.

Although 18 years is generally considered the age of majority young people are discriminated against with regard to the anomalies that exist due to inconsistencies around the age of ‘independence’. In the case of young people receiving income support a person reaches the ‘age of independence’ at 21 years if they are unemployed, and 25 years if they are a full-time student (submission 14, Youth Affairs Network of Queensland, page 4).



The Law Society of NSW comments that it is accepted and recognised that children, due to their dependency and immaturity, cannot give consent to sexual activity in the same way as adults (submission 23, Law Society of NSW, page 1). However, the Society is of the view that the age of consent should be uniform, regardless of gender. In NSW the age of consent for heterosexuals and lesbians is 16 years of age, whereas for homosexual males it is 18 years of age. The Law Society submits that this is discriminatory and supports the recommendation of bodies such as the Australian Council for Lesbian and Gay Rights to make the age of consent uniform in all Australian jurisdictions at 16 years of age.

The Youth Justice Coalition supports the concept of an age of consent but also argues that the age of consent should be equalised to 16 for all forms of sexual activity (submission 45, Youth Justice Coalition, page 7).

The Youth Justice Coalition also argues that State laws on the age of marriage and de facto relationships are inconsistent (submission 45, Youth Justice Coalition, page 6). It argues that there is nothing to stop young people from entering into de facto relationships once they reach the age of consent (in NSW 16 years of age). However, they can be denied the legal rights and protections given to both older de facto couples and older married couples. They can have legal status as guardians of their own children at 16 years of age, yet their de facto relationships are not recognised by law until they reach 18 years of age. The new *Property (Relationships) Legislation Amendment Act 1999* (NSW) applies only to adults. The Coalition suggests amending this law to apply to people aged 16 years and over (submission 45, Youth Justice Coalition, page 6).

This chapter has examined some areas where age is used to restrict people's access to various government programs, goods and services, accommodation and legal rights. While there may be an appropriate rationale for some distinctions, other age distinctions are unjustifiable, irrelevant and may have serious consequences for an individual. Age



distinctions specified in legislation and government policy do not reflect a consistent approach to age throughout Australia. People are entitled to be treated without irrelevant age discrimination in all aspects of their lives and regardless of where they live.





5 Australia's international undertakings on age discrimination

Australia has accepted at least three separate obligations to avoid and eliminate age discrimination. They are set out in

1. additional grounds under the *Discrimination (Employment and Occupation) Convention* 'ILO 111'
2. article 2 of the *International Covenant on Civil and Political Rights* and article 2 of the *International Covenant on Economic, Social and Cultural Rights*
3. article 26 of the *International Covenant on Civil and Political Rights*.

5.1 ILO 111

The *Discrimination (Employment and Occupation) Convention* – known as ILO 111 – (1958; 362 U.N.T.S. 31) was ratified by Australia in 1973. It requires States Parties to eliminate employment-related discrimination on the grounds of race, colour, sex, religion, political opinion, national extraction and social origin (article 1.1(a)). Article 1.1(b) permits a State Party to add grounds unilaterally for its own domestic purposes. In 1989 Australia added the following grounds:



age, medical record, criminal record, impairment, marital status, mental, intellectual or psychiatric disability, nationality, physical disability, sexual preference and trade union activity (*Human Rights and Equal Opportunity Commission Regulations* 1989).

ILO 111 is not incorporated into Australian domestic law. It is, however, scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOCA) with the effect that people aggrieved by employment-related discrimination on one or more of the extended list of grounds may complain to the Human Rights and Equal Opportunity Commission (HREOC) (HREOCA section 31(b)).

HREOC is empowered 'to endeavour, by conciliation, to effect a settlement' between the disputing parties. If the Commission considers such an attempt to be inappropriate or the attempt has been unsuccessful, the Commission may report to the Attorney-General and, through him, to Parliament.

In contrast with other discrimination complaints, both federal and State or Territory, HREOCA employment discrimination complaints cannot be dealt with by a court or tribunal and therefore have no enforceable remedy.

Unlike complaints about human rights violations, HREOCA discrimination complaints may concern the conduct of a federal department or agency, a State or Territory department or agency, or any private employer.

For the purposes of ILO 111 'employment' and 'occupation' are defined to include, but are not limited to, 'access to vocational training, access to employment and to particular occupations, and terms and conditions of employment' (ILO 111 article 1.3). Discrimination is 'any distinction, exclusion or preference made on the basis of [one or more listed grounds], which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation' (ILO 111 article 1.1(a)).



ILO 111 permits States Parties to introduce ‘special measures’ for specified disadvantaged groups, including age groups. Special measures can only be introduced ‘after consultation with representative employers’ and workers’ organisations’ and must be ‘designed to meet the particular requirements of’ people who, because of their age (or other status), ‘are generally recognised to require special protection or assistance’ (article 5.2). Special measures, although they give preferential treatment to one group in comparison with another, are not discriminatory because their objective is to secure equality of treatment or opportunity for people who experience discrimination; they are ‘designed to restore a balance’ (International Labour Conference 1996, page 43).

Special measures must be ‘proportional to the nature and scope of ... the existing discrimination’ and not ‘conducive to establishing or permitting actual distinctions, exclusions or preferences’ (International Labour Conference 1996, page 43).

Once adopted, the special measures should be re-examined periodically, in order to ascertain whether they are still needed and remain effective (International Labour Conference 1996, page 43).

5.2 ICCPR and ICESCR, article 2

Australia has ratified the two foundational human rights treaties, both of which require States Parties to ensure that the human rights listed are enjoyed by everyone without discrimination of any kind.

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR, 1966) was ratified by Australia in 1975. The *International Covenant on Civil and Political Rights* (ICCPR, 1966) was ratified in 1980. Like ILO 111 neither has been incorporated into Australian domestic law. Only the ICCPR has been scheduled to HREOCA with the effect that ‘human rights’ complaints to HREOC cannot rely on ICESCR rights. Note, however, that the *Convention on the*



Rights of the Child (CROC, 1989) contains many economic, social and cultural rights for the benefit of people under 18. CROC is subject to a HREOCA section 47 declaration which has the same effect as scheduling: the contents of both section 47 and scheduled instruments are ‘human rights’ for the purposes of HREOCA.

The ICCPR, ICESCR and CROC all require States Parties to ensure non-discriminatory enjoyment of human rights.

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (ICCPR article 2.1).

ICESCR article 2.2 is in similar but not identical terms. The same list of illustrative grounds is introduced with the words ‘without discrimination of any kind as to ...’. By adding the phrase ‘or other status’, however, ICESCR clearly includes the same additional grounds as the ICCPR.

CROC adds the grounds of ‘ethnic origin’ and ‘disability’ to the list of specific examples of prohibited discrimination. There can be no doubt that both are implicitly included in the ICCPR and ICESCR.

‘Age’ is not a ground which is explicitly included. However, it is clearly included as an ‘other status’ ‘such as’ those listed. The common features of the specified grounds are that they are or historically have been commonly used to distinguish among people so as to favour one group over another in their opportunities to access the means of survival and advancement or to participate fully in social and political life. They are all invidious grounds for making such distinctions because they do not reliably and universally measure ability or capacity.



This is not to say that in limited circumstances a distinction based on sex, for example, may not be justifiable. Examples include where being female is a ‘genuine occupational qualification’ such as for an actor required to play a female character. Generally, however, a person’s sex does not indicate suitability for education, employment, accommodation or the right to vote and, therefore, to discriminate on the ground of sex is invidious and impermissible.

Age is also an invidious ground for distinguishing between those entitled to participate in all areas of public life, including the enjoyment of rights and freedoms, and those disentitled. Again there may be circumstances where, due to a feature associated with a particular age group, an age distinction is justifiable. One example is the disenfranchisement of minors; another is the rehabilitative aim of juvenile justice. These examples, however, do not detract from the general description of age discrimination as invidious like the expressed grounds in article 2. Australia’s addition of ‘age’ as a ground of prohibited employment-related discrimination confirms the government’s view that age is a ground like race and colour and that its prohibition in the area of employment and occupation is reasonable and desirable.

An argument that age may be differentiated from the expressed grounds because it is not ‘fixed or immutable’ cannot be sustained. It is not true that all of the expressed, illustrative grounds in article 2 are immutable: religion and political and other opinion are all capable of alteration during a lifetime. The appropriate question is whether, *at the time* the disadvantage is experienced, the reason is the person’s religion, political opinion or age.

‘Discrimination’ is not defined in either Covenant. However, the UN Human Rights Committee, which monitors compliance with the ICCPR has advised that the term

... should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such



Oas [those listed], and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (General Comment 18, 1989, paragraph 7).

The Committee, therefore, adopted the definition of discrimination which had been agreed by parties to the Race Discrimination Convention and the Women's Convention and which is identical in scope to that in ILO 111.

The Committee has pointed out, however, that 'the enjoyment of rights and freedoms on an equal footing ... does not mean identical treatment in every instance' (paragraph 8).

... not every differentiation of treatment will constitute discrimination, if the criteria are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant (paragraph 13).

A number of explicit age distinctions are authorised and even required in international human rights provisions. For example, ICCPR article 6 prohibits the death penalty being carried out on anyone under 18; ICCPR article 23.4 requires provision to be made for the 'necessary protection' of children in the event of dissolution of marriage; ICCPR article 14 distinguishes the criminal process for juvenile offenders from that for adults and requires that for juveniles to take account of their age and the desirability of promoting their rehabilitation; ICESCR article 10 requires special measures of protection and assistance to be taken on behalf of children and young people. Indeed, the *Convention on the Rights of the Child* recognises not only that everyone under 18 requires special assistance and protection on the part of the State but also distinguishes among children and young people according to their degree of maturity (article 12).



Among the ICESCR rights which must be ensured without unjustifiable age distinctions are

- the right to work and to gain a living by work one freely chooses – article 6
- the right to just and favourable conditions of work – article 7 (see also CROC article 32)
- the right to join the trade union of one's choice – article 8
- the right to social security – article 9 (see also CROC article 26)
- the right to an adequate standard of living – article 11 (see also CROC article 27)
- the right to the highest attainable standard of physical and mental health – article 12 (see also CROC article 24)
- the right to education – article 13 (see also CROC article 28)
- the right to take part in cultural life and to enjoy the benefits of scientific progress – article 15 (see also CROC article 31).

ICESCR article 7 is of particular relevance to Australia's consideration of the justifiability of junior wage rates. Article 7 must be read subject to article 2 which requires that all rights are to be enjoyed without discrimination, including age discrimination. Article 7 provides

The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) *remuneration which provides all workers, as a minimum, with:*
 - (i) *Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work*



- (ii) *A decent living for themselves and their families in accordance with the provisions of the present Covenant (article 7).*

Civil and political rights which must be ensured to everyone without unjustifiable age distinctions include

- the right to life – ICCPR article 6 (see also CROC article 6)
- freedom from cruel, inhuman or degrading treatment – article 7 (see also CROC article 37(a))
- liberty and security of person – article 9 (see also CROC article 37(b))
- the right of everyone deprived of liberty to be treated with humanity and respect for the inherent dignity of the human person – article 10 (see also CROC article 37(c))
- freedom of movement and choice of residence – article 12
- equality before the courts and tribunals – article 14
- privacy – article 17 (see also CROC article 16).

5.3 ICCPR article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 requires States Parties to eliminate discrimination in all aspects of public life regulated by government. It is not merely a mirror image of article 2 but an independent guarantee of freedom from discrimination.



Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status (UN Human Rights Committee, General Comment 18, 1989, paragraph 1).

While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations ... In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant (paragraph 12).

Again, as in article 2, 'age' is an 'other status'. Article 26 means that Australia must eliminate all age discrimination in federal legislation.

5.4 Other international commitments relevant to age discrimination

The international community has also made a range of other commitments for the protection of the rights and well-being of older people.



International Labour Organisation Recommendation No.162 concerning older workers was adopted by the General Conference of the International Labour Organisation in 1980. Australia is a member of the ILO. The recommendation specifies

Each member should, within the framework of a national policy to promote equality of opportunity and treatment for workers, whatever their age, and of laws and regulations and of practice on the subject, take measures for the prevention of discrimination in employment and occupation with regard to older workers (Recommendation concerning Older Workers, paragraph 3).

In 1982 the United Nations General Assembly endorsed the *International Plan of Action on Ageing*. The Plan is part of an international framework of standards and strategies developed by the international community over decades.

An important objective of socio-economic development is an age-integrated society, in which age discrimination and involuntary segregation are eliminated and in which solidarity and mutual support among generations are encouraged (International Plan of Action on Ageing).

The Plan also includes recommendations.

Governments should eliminate discrimination in the labour market and ensure equality of treatment in professional life. Negative stereotypes about older workers exist among some employers and employment counsellors about the capabilities of older workers, which remain quite high in most occupations. Older workers should also enjoy equal access to orientation, training and placement facilities and services (recommendation 37).



As a basic human right, education must be made available without discrimination against the elderly (recommendation 45).

Governments should apply internationally adopted standards concerning older workers, particularly those embodied in Recommendation 162 of the International Labour Organisation (recommendation 41).

In December 1991 the UN General Assembly adopted the *United Nations Principles for Older Persons*. These 18 principles aim to promote independence, participation, care, self-fulfilment and dignity for older people. Although discrimination is not mentioned specifically, the principles state that older people should 'be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution'. Older people should also 'have the opportunity to work or to have access to other income-generating opportunities', 'be able to participate in determining when and at what pace withdrawal from the labour force takes place' and 'be able to pursue opportunities for the full development of their potential'.

Leading up to the 10th anniversary of the *International Plan of Action on Ageing* in 1992, the United Nations General Assembly adopted the *Proclamation on Ageing* which urges the international community to support practical strategies for reaching global targets on ageing by 2001. The UN subsequently declared 1999 the International Year of Older Persons with the theme 'a society for all ages', emphasising a recognition and respect for the participation of older people in all aspects of life.

These international statements demonstrate international recognition of the right of older people to participate as fully as possible in their communities and to be able to do so without discrimination.





6 Recommendations

6.1 Overview of submissions

Submissions on the discussion paper recommend a number of options for federal action. These range from community education through to legislative reform.

Education or legislation?

Many submissions emphasise the need for an education campaign to change age discriminatory attitudes. Some argue for both education and legislation and others express a preference for education over legislation. The views of members of the Council for Equal Opportunity in Employment, for example, ranged from 'too many existing different laws so why add another' through to 'education and support will modify some people's/organisations' behaviour but for the minority a specific law is what is necessary' (submission 39, CEOE, page 15).

Ability to lodge complaints is a necessary, but hotch-potch and band-aid solution to injustices. Legislate first, but promulgate knowledge of legislative requirements before and after enactment. Laws are no good if no-one knows about them (submission 25, S Hutton).

COTA believes that it is essential for age discrimination legislation to be accompanied by a community education



campaign that will reinforce the intention of the legislation but which focuses on the positive aspects of behaving and making decisions in ways that are free from age bias ... It is likely to be the case that the Age Discrimination Act will not work without such an education campaign (submission 46, COTA, page 2).

A public campaign on age discrimination combined with legislative changes would improve the situation of both younger and older people facing age discrimination ... from the experience of lawyers at Kingsford Legal Centre most people are unaware of the law relating to age discrimination and of their rights to make complaints. Age discrimination as a fact of life is widely accepted in the community and the community would be well served by a well thought out and well resourced campaign providing facts and information on this issue (submission 13, Kingsford Legal Centre, page 4).

ACCI contends that there should be a national policy of encouraging employers to develop ways of retaining the experience and skills of older people in the workplace through part-time work, job sharing and changes of duties.

A good first step would be to examine the possibility of national promotion of appropriate practice, through exploring with ACCI and others the possibility of an agreed national statement (submission 17, ACCI, page 20; see also submission 4, NSW Young Lawyers Human Rights Committee and submission 33, Community and Public Sector Union).

Kingsford Legal Centre recommends

- training in the workplace
- education in schools
- regulation of media



- discrimination studies included in journalism courses (submission 13).

Kids Help Line Queensland, in addition to supporting the need for federal legislation, suggests that media guidelines may assist the elimination of negative stereotypes of young people. As an example the Help Line cites the Resource Kit for Australian Media Professionals for the Reporting and Portrayal of Suicide and Mental Illness produced by the Department of Health and Aged Care (submission 48, page 1).

Improving complaint processes

Several submissions make suggestions on how to improve the discrimination complaint process to make it more accessible to younger and older people.

People should not have to write their complaints but should have access to audio recording facilities (submission 3, K Brennan).

These processes are difficult for other groups also. Possibly more 'shopfront' type opportunities would help (submission 40, R Reed).

One submission suggested that a video be produced to show how to make complaints and a community speakers group program be instituted in schools and senior citizens' clubs (submission 41, S Rimmer).

Kingsford Legal Centre also notes that it should be possible to submit complaints by interview or over the phone to officers of the Commission trained to assist in taking complaints. Complaint bodies should employ or offer easy access to interpreters and resources should be increased to provide advocates for younger and older people to offer more intensive assistance to complainants going through the complaint process (submission 13, Kingsford Legal Centre).



The Youth Justice Coalition agrees that the complaint processes need to be re-evaluated to make them more accessible for young people, adding that there is a pressing need for specialist youth advocacy services to help young people make complaints (submission 45, page 8).

A simplified procedure for young people making complaints and increased information about their rights would encourage a shift away from the prevailing 'macho'/'don't do' culture (submission 53, National Children's and Youth Law Centre, page 2).

Amending federal legislation

Many submissions express strong support for the elimination of age distinctions in particular federal Acts, commenting that community attitudes and the nature of society have changed since these distinctions were adopted.

COTA lists some federal Acts requiring amendment:

- *Workplace Relations Act 1996*
- *Public Service Act 1922*
- *Air Force Act 1923*
- *Defence Act 1903*
- *Safety, Rehabilitation and Compensation Act 1988*
- *Superannuation Industry (Supervision) Act 1993*
- *Corporations Law.*

COTA continues

There may also be other federal Acts which include provisions which discriminate on the basis of age. A thorough review of all federal legislation is needed to identify such provisions to be included in the development of comprehensive federal age discrimination legislation. The review should cover both direct and indirect discrimination (submission 46, page 3).



Federal age discrimination legislation

Most submissions on the discussion paper support the enactment of a federal Age Discrimination Act. Only one submission directly opposes the enactment of federal legislation on age discrimination (submission 17, ACCI). ACCI argues that the nature of age distinctions means that a large number of exemptions would be attached to an act and so it would be unwieldy and unclear.

When the full range of instances where use of age is the only feasible test or approach is considered, and the complexities that result from the need for extensive exemptions, is added to a recognition of the extraordinary complexity of the process of establishing an exemption from any anti-discrimination prohibition, the only realistic option is an extremely cautious approach (submission 17, page 19).

ACCI also has ‘very strong concerns’ about the use of the external affairs power to found federal legislation.

The Council on the Ageing (COTA) strongly argues the contrary case.

Comprehensive age discrimination legislation is necessary to provide sufficient potency to the reform of entrenched special attitudes and behaviours. It has the following potential advantages over the other possible mechanisms for eliminating age discrimination:

- *It is a clear statement of policy at the federal level and as such has a role in asserting the Commonwealth’s leadership in eliminating age discrimination.*
- *Its effects are ongoing rather than ad hoc as would be the case in a one-off education campaign.*
- *It provides an avenue of complaint and recompense for individuals affected by age discrimination.*



- *It acts as a springboard for ongoing education in the community and publicity about the negative consequences of age discrimination.*
- *There are many areas of policy and practice within the Commonwealth itself which are age discriminatory. Commonwealth legislation could require the Commonwealth and all its arms to comply with the legislation.*
- *It can play a part in fostering attitudes that enable individuals to make decisions and choices that are free from age bias (submission 46, page 2).*

Although it recommends an Age Discrimination Act, COTA also expresses concern that the recent transfer of the Commission's hearing function to the Federal Court may mean that older people will face major difficulties in lodging a complaint, including fear of being involved in a court case, costs of lodging complaints, costs of legal representation and court costs if they lose. COTA also believes that HREOC will need an additional Commissioner and additional resources to administer a new Age Discrimination Act effectively. COTA's experience in the area of age discrimination leads it to believe there will be a very large number of complaints under a new Age Discrimination Act (submission 46, page 4).

Others supporting federal legislation include the Community and Public Sector Union, the Youth Justice Coalition and the Kingsford Legal Centre.

Legislation is an important adjunct to public education. It sends a message to the community that discrimination is unacceptable and provides a means of redress for people who suffer discrimination. We support federal age discrimination legislation. We are of the view that Australia's international human rights obligations would give the Commonwealth government the jurisdiction to enact such legislation (submission 45, Youth Justice Coalition, page 8).



It is obvious that all Australians should be entitled to the same protections under the law in all matters including age discrimination. It is incumbent on the Commonwealth Government to ensure its employees have the same rights as other employees in States and Territories. The Commonwealth also has a duty to take the lead on such issues by setting out minimum national standards for the provision of essential services and goods (submission 13, Kingsford Legal Centre, page 4).

6.2 Findings and recommendations

The federal government has stated its intention to address age discrimination on a number of occasions. In its 1996 pre-election policy *Security for Older Australians*, the Coalition made commitments to ‘ensure that legislation abolishing compulsory retirement is passed in all areas of Commonwealth responsibility’. That decision was implemented by the current government in December 1999. It also promised to ‘take necessary action to remove age discrimination from all employment’ and to ‘allow persons over 65 to continue contributing to a regulated superannuation fund when they maintain a bona fide link with the workforce’.

In 1999, the International Year of Older Persons, the government announced the development of a *National Strategy for an Ageing Australia*. The Strategy is a broad national framework for action to address the challenge of an ageing population (the Hon. Bronwyn Bishop MP, *The National Strategy for an Ageing Australia - Background Paper*, April 1999). Several of the background and issues papers for the Strategy identify age discrimination as a major barrier to the employment of mature and older workers (for example, the *National Strategy for an Ageing Australia Employment for Mature Age Workers Issues Paper*, November 1999).

The Commission welcomes moves by the federal government to address the needs of older workers, such as the abolition of compulsory



retirement. However, there are still areas where legislation is inconsistent and age discrimination against both older and younger people is lawful. There is a need for a national commitment to eliminating age discrimination and removing barriers to the full participation of both young and older people in Australian society.

Submissions on the Commission's discussion paper indicate that multiple approaches to the elimination of age discrimination are most effective. The following recommendations by the Commission reflect the need for both educational and legislative measures to address discrimination.

Community awareness

Age-based stereotypes must be addressed by education and information as well as law and policy. Reform of law and policy must be accompanied by a community awareness and information campaign. Components could include

- (a) programs for employers and employees promoting the benefits of employing older workers, promoting best practice in managing age diversity in the workplace and recruitment and selection practices and providing assistance in following procedures which do rely on age as a criterion
- (b) employer and employee education programs on harassment and bullying of young workers, such as *A Secure Workplace for Young Australians* (NCYLC/WorkCover NSW), distributed by employer organisations to industries with large numbers of apprentices and trainees
- (c) media guidelines to prevent the stereotypical and damaging depictions of both young and older people in the media, such as *Don't Call Me Granny - A Guide for Communications Professionals*, produced by the Queensland Office of Ageing, Department of Families, Youth and Community Care.



Recommendation 1:

The Commonwealth should conduct a national public and business education program to counteract prevalent negative stereotypes about young people and older people, particularly with respect to their abilities in the workplace, and to inform young people and older people of their entitlements, including the right to be considered and treated without discrimination on the ground of age.

Recommendation 2:

The Department of Employment, Workplace Relations and Small Business should continue the following special measures of assistance for young and older workers:

- (a) allocating age-related points to reflect the level of disadvantage faced by job seekers and researching strategies to assist mature-aged job seekers
- (b) targeted programs to assist unemployed young people into full-time employment.

Recommendation 3:

The following special measures of assistance for older workers should be implemented.

- (a) The Department of Employment, Workplace Relations and Small Business should identify and resource employment agencies specialising in assisting older unemployed workers.
- (b) Measures such as assistance with reskilling and job search should be made available to older workers made redundant who face disadvantage in finding further employment.
- (c) Measures for extra notice of redundancy for older workers over 45 years provided in the Workplace Relations Act 1996 should be examined for the appropriateness of the age limit and, if disadvantage is perceived as occurring earlier, special measures for those under 45 should be introduced on a graduated basis.



Amending specific federal legislation

In many respects, as outlined in Chapters 2, 3 and 4, Commonwealth laws and policies are age discriminatory. Each law should be reviewed to determine whether any age-based distinctions are justifiable or whether it should be amended to eliminate its age discriminatory intent or effect. Attention is drawn, in particular, to the following employment related laws

- *Defence Act 1966* and Regulations
- *Air Force Act 1923* and Regulations
- *Naval Defence Act 1910* and Regulations
- *Safety, Rehabilitation and Compensation Act 1988* and other compensation acts
- *Superannuation Insurance (Supervision) Act 1993* and other superannuation acts
- *Corporations Law*.

Recommendation 4:

- (a) All age-based requirements for recruitment into the defence forces should be abolished and alternative non-discriminatory tests of applicant suitability should be substituted.
- (b) All defence force regulations that specify age limits for positions and/or training or promotional opportunities should be amended to ensure that selection is based on the inherent requirements of the position or opportunity rather than age.
- (c) Defence force legislation and regulations that specify compulsory retirement should be amended to abolish age-based retirement.

Recommendation 5:

- (a) The *Safety, Rehabilitation and Compensation Act 1988* and the *Seafarers Rehabilitation Compensation Act 1992* should be amended to extend eligibility for weekly workers' compensation payments to all employees irrespective of age.



- (b) Alternative methods of capping payments for workers' compensation other than by reference to age should be developed.

Recommendation 6:

The *Social Security Act 1991* should be amended to ensure that

- (a) eligibility for the independent rate of a range of income support payments is not age-related for adults aged 18 years and over
- (b) there is flexibility in the assessment of the independent rate in the case of children under 18 years in special need
- (c) age-related unemployment programs, such as Work for the Dole, provide unemployed people with the training and skills needed to overcome their particular age-related disadvantage in the labour market
- (d) benefits related to job search including access to education supplements and job seeker assistance are extended to all job seekers regardless of age if required.

Recommendation 7:

The federal government should review social security income and assets tests and benefits to ensure that older unemployed people are not discouraged from pursuing employment opportunities and saving for retirement.

Recommendation 8:

The *Migration Regulations* should be amended so that age is not used as an eligibility criterion for work-related visas.

Recommendation 9:

The *Corporations Law* should be amended to remove the maximum age requirements for company directors.



Recommendation 10:

- (a) The *Workplace Relations Act 1996* should be amended to provide that any discriminatory rule of a registered organisation of employees or employers is invalid to the extent to which it is discriminatory on any of the grounds specified in section 3(j) of the *Workplace Relations Act 1996*. Alternatively the proposed *Registered Organisations Act* should prohibit discrimination on the ground of age in the membership rules of registered organisations.
- (b) Regulation 30B of the *Workplace Relations Regulations* should be amended so that the exclusion of certain employees from the Act's termination of employment provisions does not apply to unlawful grounds of termination, including age, provided for under section 170CC of the Act.

Recommendation 11:

The Attorney-General should review all federal legislation, regulations and policy with a view to identifying all provisions which are discriminatory on the ground of age and amending or repealing any discriminatory provisions that cannot be justified as consistent with human rights standards.

Age distinctions in superannuation

The complexities of superannuation law and the relationship between law and public policy in this context demand much fuller consultation on reform than the Commission has been able to undertake for this report. In the development of more effective anti-discrimination laws and reform of superannuation legislation widespread consultation with State and Territory anti-discrimination bodies and superannuation funds will be necessary to ensure that national consistency is achieved in the treatment of superannuation, especially with regard to possible exemptions for superannuation. The IAA Discussion Paper may assist in public debate on this issue.



Recommendation 12:

- (a) The *Superannuation Industry (Supervision) Act 1993* should be amended to remove the restriction on superannuation funds accepting contributions in respect of members after they attain a certain age.
- (b) The *Superannuation Industry (Supervision) Regulations* should be amended to remove the requirement that benefits must be compulsorily cashed out when members reach 65 unless employment tests are met.
- (c) The requirement that members over 70 must be gainfully employed or compulsorily cash out their benefits should be reviewed and alternative means of limiting indefinite deferral of tax treatment explored.
- (d) The *Superannuation Guarantee (Administration) Act 1992* should be amended to remove age distinctions (whether young or old) in the requirement for employers to make superannuation contributions for employees.
- (e) All age distinctions in superannuation and related legislation should be evaluated for their necessity in achieving the objective of superannuation.

Junior pay rates

Many industrial awards and agreements in Australia provide for junior rates of pay for younger workers. Sometimes these scales provide for full rates at age 18 but in other areas even young adults, those between 18 and 21, can receive lower pay. Junior rates are determined solely on the basis of age and exclude the consideration of individual competency and responsibility levels that determine rates of pay for non-junior employees. Junior pay rates clearly constitute different treatment based on age. Junior rates are, however, currently exempt from federal, State and Territory anti-discrimination legislation.



The Commission appreciates that the federal government's support for junior rates is founded on concern that their removal could have a detrimental impact on the youth labour market. The implication in the arguments for the retention of junior rates is that junior rates are a form of protection of children and young people in employment and can be considered a 'special measure'. Indeed, international law makes it clear that children require special protection in a range of areas, including the economic sphere. The Commission notes, however, the unanimous view of youth organisations and young people in submissions to this inquiry that junior rates are exploitative, not protective, and should be repealed.

Determining the acceptability or otherwise of junior pay rates has been difficult because of the lack of unequivocal evidence as to the effect their abolition would have on the youth labour market overall. If there is no significant detrimental effect, the differences cannot be justified. The evidence, however, is inconclusive.

The review undertaken by the Australian Industrial Relations Commission (AIRC) sought to resolve this issue. As discussed in Chapter 3, the AIRC concluded that a discounted pay rate for entry level work continues to be necessary in the areas in which employment under junior rate classifications is most concentrated. It also concluded that none of the identified non-discriminatory alternatives to junior rates and most closely examined in the inquiry were feasible.

However, it also concluded that

- junior rates were relatively useless in securing direct entry to full-time employment
- in designing non-discriminatory alternatives to junior rates, a 'no one size fits all' approach has merit
- feasible alternatives to junior rates may exist although these were not presented to the inquiry (AIRC 1999, pages ix-xvi).



The Parliament accepted the AIRC's findings and, in enacting the *Workplace Relations Amendment (Youth Employment) Act 1999*, adopted a compromise position. The Act provides for junior rates to be permanently exempt from anti-discrimination provisions but also provides for junior rates to be assessed on a case by case basis and permitted where they would assist youth employment.

The Commission does not consider that the maintenance of a permanent exemption for junior rates can be justified. Special measures of protection and assistance must be temporary and periodically reviewed.

The government should continue to investigate and monitor the effect of junior rates on the youth employment market, investigate the advantages and disadvantages of junior rates in certain industries by measures such as trials and develop alternatives for non-discriminatory employment of young people.

In addition, the government should maintain its commitment to the elimination of discrimination as a clear goal in reform of the industrial relations system and federal anti-discrimination legislation (see Recommendation 14). In particular, young people require an appropriate avenue of redress for job refusals or job loss once they reach adult years. Employers should provide training and employment opportunities for all young people on junior wages or training wages.

Recommendation 13:

The federal government should

- (a) **encourage and work with industrial parties to develop and trial a full range of employment, training and wage options for young people**
- (b) **amend the *Workplace Relations Act 1996* to require the Australian Industrial Relations Commission to undertake a further review of junior rates and feasible non-discriminatory alternatives within a reasonable period**



- (c) require the Australian Industrial Relations Commission in its considerations of junior rates on a case by case basis to
- consult widely with young people and their representative organisations
 - base its assessment on whether junior rates are proportional to the objective of increasing young people's access to full-time employment and are the most effective and least discriminatory means to this end.

Legislative protection against age discrimination

All Australian States and Territories now have legislation making age discrimination unlawful, although the scope of the legislation differs significantly in some respects such as compulsory retirement. Federal law is now the weakest and most inadequate. It does not make age discrimination unlawful. It deals only with employment and then very narrowly and ineffectively. The *Human Rights and Equal Opportunity Commission Act 1986* provides that the Commission may report to the Attorney-General and to Parliament on complaints of age discrimination in employment and occupation but it provides no enforceable remedy for those who suffer discrimination. The *Workplace Relations Act 1996* makes age-based terminations of employment unlawful and requires the AIRC to ensure that industrial agreements do not have provisions which are age discriminatory. However, it does not cover a range of other areas of employment and excludes certain employees from its provisions.

Because of the weakness of federal law, age discrimination is not unlawful in many areas of federal employment, in federal contracts and consultancies, in federal programs or in the provision of federal services. The Commonwealth bears ultimate responsibility for the protection of human rights in Australia. It should lead the way and model best law and practice. So far as age discrimination is concerned, however, it lags far behind other Australian jurisdictions.



A number of steps could be taken to strengthen federal law and make it more effective in preventing age discrimination. At the minimal level the *Human Rights and Equal Opportunity Commission Act 1986* could be amended to provide enforceable remedies for age discrimination in employment. Those remedies should be the same as the remedies provided elsewhere in that Act for discrimination under the *Race Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*, that is, through action in the Federal Court. This is the least that should be done. It would provide better protection in employment and occupation but not elsewhere.

More effectively, the Commonwealth could enact a broader Age Discrimination Act comparable in its scope and application to the existing federal anti-discrimination Acts. In two reports to Parliament on age discrimination complaints which could not be conciliated the Human Rights Commissioner has recommended this step (HRC Report No. 1 1996; HRC Report No. 2 1997).

An Age Discrimination Act would bind the Crown in right of the Commonwealth and all States and Territories and the private sector. It would make discrimination and harassment based on age unlawful in a range of areas including but not limited to

- all aspects of employment including recruitment, terms and conditions of employment, promotion, workplace training, termination, redundancy, retrenchment and retirement
- all employment-related entitlements including workers' compensation and superannuation
- all actions of employment and recruitment agencies
- education and vocational training
- the provision of and access to goods and services, accommodation and health care
- the sale of land and housing
- zoning and other local government decisions



- membership of industrial organisations and clubs
- the offer of partnerships.

An Act should also provide for

- both direct and indirect discrimination to be unlawful
- lawful age distinctions in employment only where it can be shown that age is an inherent requirement of the job
- special measures of assistance for members of disadvantaged groups as defined by ILO 111 article 5
- general exemptions from the discrimination provisions of the Act following adequate consultation and negotiation, for example for
 - superannuation and insurance based on actuarial, statistical or other relevant data, if the sources on which the data are based are disclosed to the Commission or Federal Court as applicable
 - offers of voluntary redundancy and retirement
 - concessions.

Ideally Australia should have comprehensive national anti-discrimination legislation. ICCPR article 26 articulates a right to equality that the national government has promised to protect and ensure. This international treaty obligation provides a constitutional basis for Parliament to enact comprehensive anti-discrimination legislation at the federal level. As noted above the Human Rights Commissioner has already recommended the adoption of broad age discrimination legislation. The Commission has recommended federal legislation to make discrimination on the ground of religion and belief unlawful (HREOC 1998). The Human Rights Commissioner has also recommended in another report to the Attorney-General and the Parliament the enactment of comprehensive federal anti-discrimination legislation to cover grounds not included as unlawful grounds of discrimination (HRC Report No. 3 1997). These additional grounds would include age, religion, political opinion,



medical record, criminal record, social origin, trade union activity and sexual orientation. These grounds are stipulated in ICCPR articles 2 and 26, ILO 111 article 1 and the *Human Rights and Equal Opportunity Commission Regulations 1989*.

Recommendation 14:

Federal Parliament should enact a more rigorous and effective legal regime to prevent and to remedy acts of discrimination based on age. Options include

1. comprehensive national anti-discrimination legislation including the ground of age
2. an Age Discrimination Act
3. provision of enforceable remedies for age discrimination in employment covered under the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*.





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Appendix 2 Submissions

No.	Name
1.	Youth Affairs Council of Western Australia
2.	David Boxall
3.	Kevin Brennan
4.	New South Wales Young Lawyers Human Rights Committee
5.	D Clark
6.	Frank Costanzo, Unemployed Workers Group (Townsville/ Thuringowa), Qld
7.	Sol Encel, Social Policy Research Centre
8.	Office for Older Australians, Commonwealth Department of Health and Aged Care
9.	Vanessa Ford
10.	Marie Friswell
11.	J Lindsay Gardiner
12.	Independent Education Union of Australia
13.	Kingsford Legal Centre, New South Wales
14.	Youth Affairs Network of Queensland
15.	Darryl Grigg
16.	Urban Local Government Association of Queensland Inc.
17.	Australian Chamber of Commerce and Industry
18.	Stephen Harding
19.	Commonwealth Department of Employment, Workplace Relations and Small Business
20.	Resthaven Inc., South Australia
21.	H J Holcombe
22.	Bob Holderness-Roddam
23.	The Law Society of New South Wales
24.	Stephanie Honner
25.	Sarah Hutton
26.	Alzheimer's Association of New South Wales
27.	Association of Superannuation Funds of Australia



28. Kate Lindsay, Faculty of Law, University of Newcastle
29. Commonwealth Department of Family and Community Services
30. Hobart Community Legal Service, Tasmania
31. Institute of Actuaries of Australia
32. Office of the Commissioner for Equal Opportunity, South Australia
33. Community and Public Sector Union
34. Office of Seniors Interests, Western Australia
35. Professor Rhonda Nay, Head of School of Nursing and Professor of Gerontic Nursing, La Trobe University
36. Peter Needham
37. Anthea Nolan, Arthur Robinson & Hedderwicks
38. Alan Oakes
39. Council for Equal Opportunity in Employment
40. Dr Rosslyn Reed, Faculty of Humanities and Social Sciences, University of Technology, Sydney
41. Sheila Rimmer
42. Mental Health Legal Centre, Victoria
43. Celia Roberts
44. Nissan Motor Co. (Australia)
45. Youth Justice Coalition
46. Council on the Ageing (Australia)
47. Rev. Eric Smith, Hobart City Centre Congregation, Uniting Church in Australia
48. Brook Teale, Kids Help Line
49. Colin Thatcher, Business Council of Australia
40. Confidential
51. Anti-Discrimination Commission, Queensland
52. Anthony David Wickens
53. National Children's and Youth Law Centre
54. Dr Lynne Bennington, Graduate School of Management, La Trobe University
55. Herman A Zirkee
56. Department of Families, Youth and Community Care, Queensland
57. Celia Bevan



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