



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

2010

Age discrimination –
exposing the hidden
barrier for mature
age workers



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Foreword

Since the introduction of the federal *Age Discrimination Act 2004* (Cth), experiences of age discrimination in employment among mature age workers have featured prominently in the complaints of age discrimination received by the Australian Human Rights Commission. In 2008-09, I undertook a series of consultations with peak bodies including age-based community groups, legal service providers, business groups, unions, academics and relevant government departments. As well I undertook research to learn more about the barriers to employment facing mature age workers.

A number of general themes emerged including mature age workers' access to appropriate skills and training, the ability to balance unpaid caring work, issues of law reform and the lack of detailed Australian research into these issues. One of the foremost barriers that emerged was that of unlawful age discrimination – and this in the face of one of the most significant demographic shifts in modern human history where populations across the globe are ageing.

Age discrimination is entrenched through ageism, which can be found in almost every sphere of public life. It doesn't just exist – it thrives. Disturbingly, unlike other forms of discrimination, age discrimination and ageism don't yet seem to be at the point of being stigmatised.

Many people have written to me and told me of their experiences of age discrimination, spanning everything from recruitment to their terms and conditions of employment. Yet this issue appears to be largely invisible, deeply entrenched and worse still, accepted within our community. When I have spoken about age discrimination on radio and television, switchboards have run hot with people wanting to tell their personal stories. Often they have simply been relieved to hear the experiences that they are going through, not only named, but brought out into the open.

This is what the paper seeks to do – it names and examines this form of discrimination. The paper explains what age discrimination and ageism are and what they can look like in our workplaces. It explains the rights we need to protect us from unlawful age discrimination and the effects of ageism and outlines the often devastating impacts this form of discrimination can have on the lives of individuals, our communities and our nation as a whole.



Elizabeth Broderick
Sex Discrimination Commissioner
and Commissioner responsible
for Age Discrimination

In my role as Commissioner, when I look at the community's awareness of sex discrimination issues compared with age discrimination issues, the difference is stark. It is imperative that this change. This paper represents a starting point. The challenge of unlawful age discrimination and ageism is an on-going one for which all of us must take responsibility. When we think of respect, dignity and enjoyment of human rights, age equality must be front and centre.

A handwritten signature in black ink that reads "E. Broderick". The signature is fluid and cursive.

Elizabeth Broderick
Sex Discrimination Commissioner
and Commissioner responsible
for Age Discrimination

October 2010

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Executive summary

The purpose of this paper is to look at and raise awareness of the issues of ageism and unlawful age discrimination against mature age workers within the workplace. It is a form of discrimination that appears to sit quietly – it can go unnoticed and seems largely accepted. This paper aims to expose it.

In a number of Commission consultations and in research, unlawful age discrimination emerged as a serious disincentive to mature age workers continuing in paid work. The Australian Bureau of Statistics defines anyone over the age of 45 years as a ‘mature age’ worker. Yet this is no ‘magic’ number. People of any age can be told they are ‘too old’ for a job. The majority of the age discrimination complaints received by the Australian Human Rights Commission in 2008-09 related to employment. Most of these complaints were made by individuals over the age of 45 years.

In part two we clarify the concepts of ‘ageism’ and age discrimination. While both ‘ageism’ and age discrimination can apply to people of any age (younger, older and in-between) this paper considers the concepts as they apply to mature age workers. Ageism has been described as ‘a process of systematic stereotyping of, and discrimination against people’ simply because they are older. Our ageist culture appears to be largely invisible, accepted and unacknowledged. Attitudes that employers and recruiters may hold are reflected in and reinforced by negative attitudes to older age found in our community.

In part three we examine current legal recognition and protection of ‘age’ in Australia and at the international level. Legal protection is often looked to as a solution to ensure that all people have real equality in terms of a more equal playing field. While important, legislation is only one part of the tool-kit needed to tackle broader systemic issues like ageism. In Australia the Age Discrimination Act is crucial to the recognition and protection of rights against unlawful age discrimination. It offers protection in most areas of public life and provides a complaint mechanism to enforce rights. It is also important in raising awareness of these issues in our community.

Australian federal anti-discrimination laws are related to the international human rights system as they are based in part on international human rights agreements developed through the United Nations system. The aim of these agreements is to further the goal of equality for all people. Yet there is no dedicated, binding international agreement that deals specifically with the rights of older people, as there is for other disadvantaged groups. This represents a ‘gap’ in international legal recognition for older people.

In part four we explore the ways age discrimination can manifest itself in the everyday working lives of mature age workers. This can include recruitment processes and – where mature age workers are employed – access to training, promotions and flexible work practices and issues with insecure employment, targeted restructures and age-based bullying.

Finally, in part five we make the case for eliminating unlawful age discrimination in employment by considering the major economic, social and psychological costs that can result from it. Our government considers it vital to national productivity that all people who want, or need to be in paid work are able to do so. Where mature age workers cannot work because of discrimination, some have no choice but to rely on social security. Reliance on social security can result in people living in poverty in their later years – a serious social cost. In addition, being denied access to paid, quality employment opportunities can result in acute mental health impacts.

If we are seriously to address unlawful age discrimination and the treatment of mature age workers, we need a social movement of the kind that has built awareness of other forms of discrimination within our community. Our ageist society can be changed through an awareness of our rights, law reform, much-needed continued research and education campaigns which are core initiatives in confronting systemic age discrimination. Only by raising awareness of and combating unlawful age discrimination will we be able to ensure that everyone’s human rights are respected and protected in a society that is truly inclusive of us all.

1 Introduction

The purpose of this paper is to look at and raise awareness of the issues of ageism and unlawful age discrimination against mature age workers within the workplace. So why is the focus on mature age workers and employment?

As it is considered necessary for people to have the ability to access work and to stay in work, our laws recognise employment as an important area of public life that is deserving of protection from discrimination. The importance of this is also recognised at the international level where people have a recognised right to work free from discrimination.¹ The majority of the age discrimination complaints received by the Australian Human Rights Commission in 2008-09 related to employment.² Most of these complaints were made by individuals over the age of 45 years.³ This is of particular concern given Australian Bureau of Statistics data predicts that the proportion of the Australian population aged 65 years and over is likely to nearly double between 2007 and 2056 with the proportion of people over 85 predicted to almost quadruple.⁴

In a number of consultations and in research conducted by the Commission, unlawful age discrimination emerged as a major disincentive to mature age workers continuing in paid work.⁵ Even though there are individual employers who do not discriminate against employees on the basis of age, age discrimination appears to be a widespread barrier to work.

So while the concepts of ageism, age discrimination and age discrimination laws apply to younger people, older people and anyone in between, this paper will focus only on one end of the spectrum – older people, specifically mature age workers. The Australian Bureau of Statistics defines anyone over the age of 45 years as a ‘mature age’ worker.⁶ However this is not a ‘magic’ number. People of any age can be told they are ‘too old’ for a job. It is a form of discrimination that appears to sit quietly – it can go unnoticed and seems accepted. This paper aims to expose it.

Mature age workers are like any group of people – diverse. While this paper will focus on age discrimination, it is important to remember that when a mature age worker experiences age discrimination, any experience of race, sex, sexual orientation and/or disability discrimination can compound their difficulties and make worse the disadvantage they are experiencing.

In examining the issues facing mature age workers we are not advocating that mature age workers be forced to work for longer. Rather, we are talking about enabling the choices of those people who need or wish to work, to do so without discriminatory barriers.

Also in focusing on mature age workers we are not implying that unlawful age discrimination is more or less acceptable against young people than for mature age workers. What we argue for is the elimination of unlawful age discrimination so that people of all ages are judged on their merit.

The paper is in four parts and will consider the following issues:

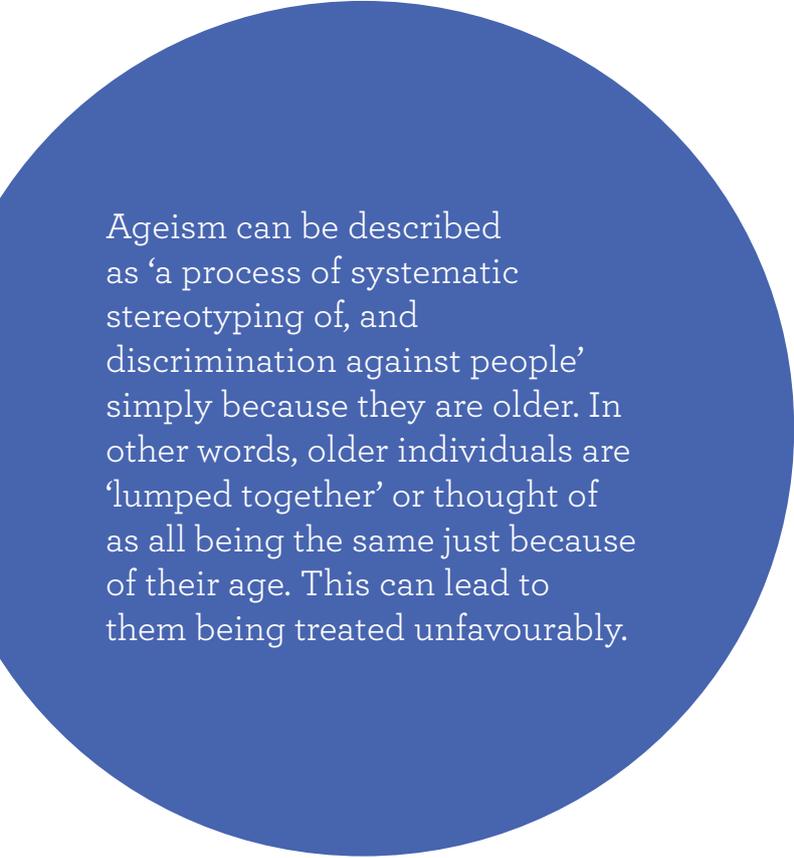
- Ageism and age discrimination – what is it?
- The Age Discrimination Act and the international legal framework – what are the protections?
- Age discrimination in the workplace – what does it look like?
- Impacts of age discrimination – what are the consequences?

2 Ageism and age discrimination – what is it?

Age discrimination in our workplaces does not occur in isolation from the rest of society. If unlawful age discrimination is occurring in our workplaces it is highly likely that such attitudes also exist outside of the workplace. As one business representative stated during our consultations, the way some employers treat mature age workers simply reflects ‘the wider social context, the obsession with appearance, and the high value placed on being vital and young’.⁷ If age discrimination in the workplace reflects broader attitudes in our community, then one of the root causes is ageism.

The first section of this paper, which is split into three parts, will look at the concepts of ‘ageism’ and ‘age discrimination’:

- What is ‘ageism’?
- The link between ageism, age discrimination and employment; and
- Age-based stereotypes in employment.



Ageism can be described as ‘a process of systematic stereotyping of, and discrimination against people’ simply because they are older. In other words, older individuals are ‘lumped together’ or thought of as all being the same just because of their age. This can lead to them being treated unfavourably.

2.1 What is ageism?

As mentioned earlier, while both ‘ageism’ and ‘age discrimination’ can apply to people of any age, this paper will only look at the concepts of ageism and age discrimination to the extent that they apply to mature age workers.

So what is ageism? Ageism is often mentioned in the context of advertising, in the television industry and in access to certain services, but what do people actually mean by it?

Ageism can be described as ‘a process of systematic stereotyping of, and discrimination against people’ simply because they are older.⁸ In other words, older individuals are ‘lumped together’ or thought of as all being the same just because of their age. This can lead to them being treated unfavourably.

Ageism has been described as promoting the ‘ideal of youth’, as part of a society that actively promotes an obsession with appearance and being ‘vital and young’.⁹ Ageism has also been portrayed as reflecting deeply-held fears and a state of denial about the biological fact that we are all ageing.¹⁰ Either way, the implication is that a person’s age becomes a badge for pre-determined or pre-set behaviour regardless of that person’s actual individual qualities.¹¹ Take, for example, the now common-place use of generational labels like ‘Gen Y, Gen X and baby boomers’. These distinctions may be used to compare people’s different social and technological experiences. But when they are used to assume personality traits and characteristics for an entire age group they are merely a way of stereotyping people.

Ageism can also reflect the widely-accepted idea that life occurs in fixed stages¹² – when you are supposed to have kids, when you are supposed to start your career and when you are supposed to retire. Yet the reality is that people make diverse choices in their lives. There is increased flexibility and diversity in terms of if and when we have kids, how many careers we decide to have, who we must provide care for, how and when we decide to work and whether we want to retire at all. People’s life choices do not fit neatly within rigid age-related boxes, yet this outdated idea persists.

When we think about attitudes to ageing within our own community, there is a tendency to dwell on the negative. Ageism can affect the way older people are viewed and treated. Its impact can be seen in many areas of public life. For example, the thriving, multi-billion dollar 'anti-ageing' industry markets products and services that actively promote the idea of delaying or reversing ageing.¹³ It has been suggested that the anti-ageing industry reinforces 'the belief that old age is repugnant... promising relief to those who can pay'.¹⁴

Overseas advertising research has found that older people are often negatively portrayed in advertisements as 'bumbling, crotchety or senile'.¹⁵ Such advertising can contribute to a fear of ageing despite the fact that ageing 'is not necessarily about aches and pains [but]...is about living'.¹⁶

Likewise, in the health industry, some people feel that rather than simply treating issues as health issues, the attitudes of some health professionals may make people feel 'old'.¹⁷ It has been suggested that certain symptoms in older patients (such as balance problems, memory loss and depression) can be dismissed from the outset as 'old age' instead of being viewed as potentially treatable health conditions.¹⁸ A clear example of the way ageism can influence policies involving older people can be seen in a situation which involved a UK

nursing home. It had a practice of routinely placing its residents in special 'tilt-back' wheelchairs, regardless of whether or not they could walk.¹⁹ This meant that residents who were still able to walk unaided were stopped from doing so. This severely affected their ability to make personal choices about everyday activities, such as feeding themselves and using the bathroom. As a result of human rights objections raised in relation to their right to respect for private life, this degrading, 'one-size-fits-all' practice was stopped.²⁰ The policy was then changed so that residents who could walk were taken out of the chairs and encouraged to maintain their walking skills.²¹

Research into the depiction of older people in the media, regardless of format, has found that they are either underrepresented or represented through negative images.²² Specifically, overseas research shows that older people are significantly under-represented in prime time television shows.²³ The quality of media representation is 'poor and inadequate'. Older characters are typically 'marginalized, rarely appeared in major roles or positions, rarely develop[ed] fully as characters and are frequently described in stereotypical terms'.²⁴

In a letter written to the Commission about the Australian television industry, a woman observed:



The media reinforces ageism...the television industry really only employs women in a certain age group that look good on camera and [it's] the back office later on. Surely we must break this attitude...particularly if we or the next generation have the choice to work until age 67.

Here the writer identifies a link with the way ageist attitudes in one area (television) can influence and spread into other areas of everyday life, such as employment.

2.2 The link between ageism, age discrimination and employment

In our research and consultations, a number of people noted that this ageist culture appears to be invisible, accepted and largely unacknowledged within our community.²⁵ The attitudes that employers and recruiters may hold in relation to mature age workers are reflected in and reinforced by the negative attitudes to older age that we see in our general community. Another woman who wrote to the Commission told us:

I live in an area where ageism is rampant and I am currently studying a Masters in Human Resource Management...which is obviously up-to-date in terms of job skills, and it does not make one scrap of difference in the job market. I have 3 other degrees as well, and these too fit in contemporary markets. I'm 54 and no-one wants me. It is very disillusioning. The only job I have is [as a] casual...and that's all I can get.

Some argue that these negative attitudes have come about because of the shift from placing value on experience to favouring efficiency and compliance over quality (also known as the work intensification model).²⁶ This shift buys into stereotypes of older people as 'experienced but high risk and inefficient' and of younger people as 'inexperienced and compliant'. Instead of seeing 'age' and 'ageing' as simply part of the ordinary course of a person's life span, negative generalisations and stereotypes are used.²⁷ Rather than seeing workplaces as made up of diverse people of all ages, backgrounds and characteristics,²⁸ the overriding message for older workers seems to be that mature age is a one-way ticket to certain decline.²⁹

2.3 Age-based stereotypes in employment

Age-based stereotyping can be described as a form of ageism and age discrimination. Stereotyping a person by age involves applying certain personality traits to a person of a particular age, regardless of that person's individual qualities.³⁰ In this way, as mentioned previously, 'generational labels' such as Generation Y, Generation X and the Baby Boomers can be simplistically used to generalize the personality traits of entire age groups of people. At their worst, such stereotypes can encourage a negative form of competition between people of different age groups by pitting them against each other e.g. 'older people' are seen to have had a 'good run' and are now denying job opportunities to 'younger people'.

The use of the language of 'deadwood middle manager'³¹ by some employers when deciding, for example, who to make redundant is another example of an age-based employment stereotype.

Age-based stereotyping can be described as a form of ageism and age discrimination. Stereotyping a person by age involves applying certain personality traits to a person of a particular age, regardless of that person's individual qualities.



Within the employment context, mature age workers can be stereotyped as unable to learn new skills, as too 'dependent', as being in decline or as offering 'more limited returns'.³² Where the process of getting older is linked with general assumptions of a person's physical decline and potential for injury – whether or not this is correct – such stereotypes become a thin cover for issues of disability discrimination. Avoiding mature age workers because of a perceived 'disability risk' may be discriminatory and reveals an attitude of unwillingness by some employers to provide workplaces that enable people with different abilities to work to their full potential. This is quite apart from the fact that research shows that workers with disability have a lower number of occupational health and safety incidents compared to other workers.³³ Mature age workers such as those working in middle management, can also offer an easy scapegoat for employer anxieties about rapidly changing markets, technology, laws and structural issues and the difficulties employers can have in coping with these changes.³⁴

One of the problems with age-based stereotyping is that people often do not believe they are being ageist. They see their stereotyping as simply reflecting 'the truth' or 'reality'.³⁵ This picture gets more complicated when you consider that certain forms of age

discrimination are a part of everyday life and are widely accepted as necessary – for example, minimum ages for alcohol consumption and voting.³⁶ Yet, while there may be sound protective reasons for limiting the consumption of liquor by minors, should the same reasoning apply to a person's ability to perform a job after a certain age?

In the workplace, discriminatory practices instructing recruiters 'not to send me CV's of anyone over 40', can be cheaper and easier than undertaking a proper individual assessment of someone's actual ability to do the job.³⁷ Cheap and convenient though this practice may be, these kinds of attitudes and practices result in unreasonable assumptions and stereotypes that could be unlawful under our anti-discrimination laws. The longer these ageist attitudes and practices persist within our workplaces, the more likely it is that mature age workers will suffer the consequences – or worse, start to believe and accept these stereotypes themselves.

When the federal Age Discrimination Act was passed in 2004, it sent a clear message to our community that, in certain areas of public life, discrimination on the basis of age was not only unacceptable but unlawful.

3 The Age Discrimination Act and the international legal framework – what are the protections?

When dealing with a deeply entrenched form of discrimination, legal protection (such as the Age Discrimination Act) is often looked to as a way to tackle broader issues such as ageism. As mentioned earlier, ageism can be described as ‘a process of systematic stereotyping of and discrimination against’³⁸ older people who are ‘lumped together’ as being the same and treated unfavourably because of their age. The broader systems and practices within our community that lead to age inequality can be described as a form of *systemic discrimination*. Systemic discrimination has been defined as ‘practices which are absorbed into the institutions and structures of society and which have a discriminatory effect’.³⁹ These practices can produce ‘general...disadvantage for a particular group’⁴⁰ – such as older people.

Addressing forms of systemic discrimination is seen by many as crucial to achieving real age equality or *substantive age equality*. The concept of substantive equality recognises that some groups are in a better position in society than other groups, who are held back by disadvantage and discrimination.⁴¹ In relation to age, if all people were to be treated the same even when they are not, it would simply set up people in disadvantaged age groups to fail.⁴² In order to ensure that people of all ages have real equality in terms of a more equal playing field, practices and structures that disadvantage certain age groups need to be improved⁴³ so that everyone truly can have equal chances, opportunities and outcomes in our society.

What part do our existing legal protections play in achieving the goal of substantive age equality? This section examines the current legal protections that relate to age discrimination by considering the following four issues:

- How is ‘age’ recognised at the international level?
- What legal protections do Australian anti-discrimination laws offer?
- What is the role of the Age Discrimination Act in our workplaces?
- What are the key elements of the Age Discrimination Act?

3.1 How is ‘age’ recognised at the international level?

In Australia, the Age Discrimination Act is the most recent of the federal anti-discrimination laws. It sits alongside the other three pieces of federal legislation that protect against discrimination on the basis of race, sex and disability respectively.⁴⁴ The Age Discrimination Act is the primary vehicle for promoting age equality nationally.

Australian federal anti-discrimination laws are related to the international human rights system because each of our Acts is based in part on international human rights conventions or agreements. These conventions and agreements have been developed through the United Nations system. The aim of these conventions and agreements is to further the goal of equality for all people, regardless of race, sex, religion and other status, across all countries who agree to be bound by these obligations.

Yet there is no binding international agreement that deals specifically with the rights of older people. Older people’s rights are not expressly mentioned in the two major international human rights agreements – the *International Covenant on Civil and Political Rights* (ICCPR) or the *International Covenant on Economic Social and Cultural Rights* (ICESCR). Only the *Universal Declaration of Human Rights* refers to age, and then only in the limited context of the right to security in old age.⁴⁵

Nonetheless, in countries which have agreed to be bound by these obligations, the rights contained in the ICCPR and ICESCR apply to all people, including older people. In addition, the rights and protections contained in the ICCPR are to apply without distinction as to someone’s ‘race, colour, sex...[etc] or other status’.⁴⁶ While age is not specifically listed, ‘other status’ has been interpreted to include age.⁴⁷

A number of employment-specific and regional conventions also contain provisions relating to older people. For example, the *International Labour Organisation Convention 142* states that career guidance and training must be applied without discrimination as to age.⁴⁸



The 'gap' in international legal recognition for older people is that there is no dedicated, binding international instrument or agreement that deals specifically with the rights of older people, as there is for other disadvantaged groups. It could be argued that this suggests that older people's rights are less important than other groups' human rights and that it increases the invisibility of older people's vulnerability as a group. Arguably in this situation issues of ageism and systemic discrimination seem less likely to be identified and substantive equality less likely to be achieved.

3.2 What legal protections do Australian anti-discrimination laws offer?

Our anti-discrimination laws are an important part of recognising and protecting people's right to be free from discrimination. The Age Discrimination Act, together with relevant state and territory laws, protect against age discrimination in many areas of public life such as employment, education and in access to accommodation and goods and services. Like other federal anti-discrimination laws, the Age Discrimination Act allows one or more individuals to enforce their rights by making a complaint about discrimination.

The Age Discrimination Act is also an important tool for raising awareness of unfair employment practices and influencing policies and structures that support ageism within our

community. Nevertheless, decisions about when and where to recognise and protect against discrimination are made by our policy-makers and, ultimately, our Parliament. These decisions and limitations are reflected in what our laws cover and what they do not cover. Legislation is only one part of the tool-kit needed to tackle broader systemic issues like ageism but laws like the Age Discrimination Act are crucial to the recognition and protection of rights.

3.3 What is the role of the Age Discrimination Act in our workplaces?

Firstly, the Age Discrimination Act gives workers the ability to complain to the Australian Human Rights Commission about unfair treatment based on age and to have their complaint conciliated. For mature age workers who are denied employment, offered less beneficial terms and conditions of employment or who have been unfairly dismissed because of their age, the ability to bring a complaint to the Australian Human Rights Commission significantly expands their rights within the workplace.

Secondly, as employers and workers learn about their rights and responsibilities, the Age Discrimination Act can be an important educational tool for bringing about change in Australian workplaces. As anti-discrimination laws have become part of Australia's legal landscape, the idea of equality at work has

filtered into large sections of the Australian workforce, raising expectations of equal treatment. The Age Discrimination Act can be an effective tool in providing legal protection against forms of unequal treatment and raising awareness within workplaces on issues of unlawful age discrimination and ageism within the workplace.

3.4 What are the key elements of the Age Discrimination Act?

The Age Discrimination Act does not make all types of age-based discrimination unlawful. The Act sets out a number of requirements that must be met in order for an act to amount to unlawful age discrimination. It must:

- fall within the definition of ‘direct’ or ‘indirect’ age discrimination;
- have occurred in a specified ‘public’ *area* such as in education, employment, provision of goods and services or administration of government programs; and
- not fall within one of the *exemptions* in the Act.

The first step in addressing an alleged act of discrimination is to lodge a complaint with the Australian Human Rights Commission. The Commission tries to resolve the complaint by conciliation. Through the conciliation process the person may obtain a remedy to their situation such as reinstatement, changes in company policy, financial compensation and/or an apology. If the complaint remains unresolved, the person making the complaint may then proceed to the court.

(a) Direct and indirect age discrimination

Direct age discrimination takes place when a person treats another person less favourably than he or she would treat a person of a different age. This direct form of discrimination will be unlawful if it is carried out because of a person’s actual age, but also if it is based on assumptions or generalisations about older or younger people.⁴⁹ For example, direct discrimination could include a job advertisement that required applicants to be under 40 years old, but could also include an older person being turned down for a job on the assumption that they would not be competent at using new web-based technologies.

Example: Direct discrimination in employment

The complaint involved a 50 year old woman who worked on a casual basis as a customer service representative with a car hire company. She had worked with the company since 2002, and was originally employed on a full-time basis. She claimed that, at a meeting with her manager, she requested a permanent part-time position and a roster change so she would be allocated more hours. She said the manager declined her request and suggested she consider going to work for establishments where ‘...50 to 60 year old ladies scan products they really do not know anything about’. She claimed that, following this meeting, her working hours were reduced and she believed this was because of her age.

The company said the alleged incident involving the manager was investigated, and the manager was counseled for making the comment to her. The company denied that her request for a permanent part-time position and a roster change was rejected because of her age, and advised the decision was based on operational requirements.

The complaint was resolved with an agreement that she would be appointed to a permanent part-time position and provided with an *ex gratia* payment of \$5000.

Indirect age discrimination takes place when a person, without necessarily intending or meaning to discriminate against anyone, imposes a condition, requirement or practice on another person that has the effect of disadvantaging him or her because of their age. The ‘condition, requirement or practice’ (i.e. such as contained in a company policy) must also be unreasonable.⁵⁰ For example, a job advertisement requiring ten years of experience in a certain field may be unlawful because it is less likely that young people will be able to meet the requirement. However, if an employer can show that it is reasonable to require a specific number of years of experience for a particular position, it will be permitted under the Age Discrimination Act.

The Age Discrimination Act does not set out any factors to be taken into account when determining whether a condition, requirement or practice is ‘reasonable’, although court decisions provide guidance on what could be considered ‘reasonable’.

Example: Indirect discrimination in employment

A man was employed at a medium sized manufacturing company for 31 years. His original contract of employment specified that if he became redundant, he would get 2.5 weeks salary per year of service (uncapped). A month before he was made redundant, the company capped redundancy payments at 36 weeks. The man, who was in his early sixties, claimed he received less than half the pay out he would have expected to receive under the old policy. He alleged the change of policy was indirect discrimination on the ground of age as the policy change had a disproportionate effect on older workers who were more likely to be eligible for more than 36 weeks redundancy payments. Younger employees who were made redundant did not have sufficient years of service to be adversely affected.

However, the Commission receives the greatest number of complaints in the area of employment (see Table 1, below). The majority of these involve mature age workers.

Table 1: Complaints received under the Age Discrimination Act in 2009-10, by area:

Employment – too old	50%
Employment – too young, or youth wages issue	15%
Provision of goods and services	25%
Accommodation	1%
Superannuation/Insurance	4%
Access to premises	0.5%
Education	1.5%
Commonwealth laws and programs	3%

(b) Areas of discrimination

Age-based discrimination will only be unlawful if it falls within one of the protected areas of public life outlined in the Age Discrimination Act. While this paper is concerned mainly with age discrimination against mature age workers in the area of employment, the Age Discrimination Act also covers other areas. These include:

- education;
- access to goods, services and facilities;
- accommodation;
- access to premises; and
- the administration of Commonwealth laws and programs.

Potential examples of discrimination in these areas are: a club that restricts entrance to people of a certain age (access to premises and the provision of goods and services); or an organisation that restricts access to student discounts to people below a certain age (access to goods and services).

(c) Discrimination in employment – who does it cover?

Protections against age discrimination in employment cover all types of workers including full-time, part-time and casual employees, as well as commission agents and contract workers.⁵¹ Protection extends to recruitment practices and offers of employment, as well as the terms and conditions of employment, access to promotion and training opportunities and dismissal from a job.

Discrimination that occurs in partnerships and by qualifying bodies (bodies which provide authorisations or qualifications for a profession or trade) and employment agencies are also covered.

Example: Age discrimination in recruitment

A 55 year old man applied for a graduate information technology position with a large government department via a private employment agency. The man said that despite having worked for the department for 10 years and having over 30 years relevant experience, his application was rejected. The man claimed the employment agency told him that he should not be applying for graduate positions. He alleged discrimination on the basis of his age.

The department denied discriminating against him and said it was unaware of the man's application as it only became involved in the recruitment process once candidates were short-listed by the employment agency, and he had not reached that stage of the process. The employment agency also denied discriminating against him on the basis of his age. The agency said that data in relation to an applicant's age or age group was not sought or considered relevant. The agency claimed that his application for the graduate position was rejected because of a mistaken belief that he was employed with the department at the time of his application.

The complaint was resolved through a conciliation process with the employment agency agreeing to pay the man \$2000 general damages and contribute \$4500 towards legal costs.

(d) Defence of 'inherent requirements' – you must be able to do the job

In some circumstances it is not against the law to discriminate against someone because of their age if they cannot perform the inherent or essential requirements of the job.

To determine whether a person is unable to carry out the inherent requirements of a particular job, the following factors must be taken into account:

- the person's past training, qualifications and experience relevant to the particular job;
- if the person is already employed by the employer – the person's past performance as an employee; and
- all other relevant factors that are reasonable to take into account.⁵²

The courts have interpreted 'inherent requirements' of a particular job to mean 'something essential'⁵³ to a particular position. In working out whether something is an inherent requirement of a particular job you must look at the function the worker performs as part of the employer's business. However, employers are not allowed to organise or define their business in a way that would allow them to discriminate against their workers on this basis.⁵⁴

(e) Exemptions

The Age Discrimination Act contains a number of general exemptions. The effect of an exemption is that conduct or behaviour that would otherwise amount to age discrimination will not be unlawful if it falls within one of the exemptions. The reasoning behind certain exemptions is that they allow for otherwise discriminatory actions to occur because they are seen as necessary or leading to a good outcome for certain social purposes. For example, the Age Discrimination Act provides that it is not unlawful to provide health services only to people of a particular age if evidence shows that such a service would be effective for those people.⁵⁵

Other exemptions can in certain circumstances protect entire institutions from the reach of anti-discrimination laws. For example, the 'religious bodies' exemption in the Age Discrimination Act allows religious bodies, such as church institutions, to discriminate against people on the basis of their age if it 'conforms to the doctrine, tenets or beliefs of that religion' or 'is necessary to avoid injury to the religious sensitivities of adherents of that religion'.⁵⁶

The Age Discrimination Act also includes exemptions for: youth wages; superannuation and insurance (where discriminatory actions must be based on statistical data and be reasonable); discriminatory acts done in direct compliance with another law and the administration of migration and citizenship laws.⁵⁷

The Commission has expressed concerns about the breadth of some of the exemptions contained in the Age Discrimination Act when compared to other anti-discrimination laws at the federal level.⁵⁸

Example: Exemption for acts done in compliance with another law

A university professor, who was 64 years of age, received a three-year research grant which he was to administer. His university told him that, because of his pending retirement, he could not take on this role. The professor brought a complaint of age discrimination to the Australian Human Rights Commission.

The university advised that its statute states that professors can only hold office until the end of the calendar year in which they reach 65 years of age. The university said that it must act in accordance with the statute and claimed that an exemption under the Age Discrimination Act applied. The matter was resolved through a conciliation process where the parties agreed that the university would employ the professor for a further fixed term three year contract.

(f) 'Positive measures'

The Age Discrimination Act recognises that there are times when people need to be treated differently in order, for example, to remedy disadvantage that they experience because of being older or younger – that is to level the playing field. The Age Discrimination Act provides for positive measures to be taken on the basis of age, if those measures:

- provide a genuine benefit to a person of a particular age;
- meet an age-based need of people of a particular age; or
- reduce a disadvantage experienced by people of a particular age.⁵⁹

The following are three examples of what can be permitted.

Examples: Positive measures

A hairdresser giving a discount to a person holding a Seniors Card or a similar card, because giving the discount provides a benefit to older people who are no longer working.

The provision of welfare services to young homeless people, because such services are intended to meet the often greater needs of young people for welfare services.

Additional notice entitlements for mature age workers being retrenched, because older people are often more disadvantaged by retrenchment.

(g) Age discrimination and disability discrimination

The Age Discrimination Act states that discrimination against a person on the ground of his or her age does not include a reference to discrimination against a person on the ground of disability (within the meaning of the federal *Disability Discrimination Act 1992* (Cth)).⁶⁰

This provision deals with potential overlap between age and disability discrimination. There are instances where an older person experiencing age discrimination may also be subjected to disability discrimination. This provision makes it clear that complaints of age discrimination that would also be covered by the Disability Discrimination Act should be dealt with under the latter.⁶¹

However, this provision does not prevent a person from lodging a claim of both age and disability discrimination if he or she experiences separate but related acts of discrimination under each of these grounds.

This section has summarised how the current state of the law recognises and protects against age discrimination. But at the level of the every day, how does unlawful age discrimination play out in people's lives? What can it look like?

4 Age Discrimination in the workplace – what does it look like?

As mentioned earlier, in a number of consultations unlawful age discrimination emerged as a serious disincentive to mature age workers accessing and continuing to work,⁶² as well as appearing to be one of the least acknowledged barriers to workforce participation. To date, the Commission's consultations and research have revealed instances of age discrimination against mature age workers across all stages of employment. This includes in recruitment processes and, where mature age workers are employed, in the terms and conditions of their employment.

This part of the paper will consider what unlawful age discrimination can 'look like' in the working lives of mature age workers. This section is split up into the following parts:

- Age discrimination in recruitment; and
- Age discrimination in employment.

4.1 Age discrimination in recruitment

When looking at age discrimination and employment we have to start right back at the point where a person first applies for a job. It is clear that it is in the recruitment context that the first battle of unlawful age discrimination must be fought.⁶³ Unlawful age discrimination in recruitment has been described as rampant,⁶⁴ systemic⁶⁵ and the area of employment decision-making where managers use age to differentiate between people most extensively.⁶⁶

Age discrimination can affect recruitment practices in a number of ways. For example job advertisements that call for 'innovative', 'dynamic' and 'creative'⁶⁷ people can be used as shorthand for 'young'. The ways in which job applicants are short-listed can also be discriminatory where, for example, employers only offer apprenticeships to young people,⁶⁸ or where people must reveal their date of birth in applications⁶⁹ despite it being irrelevant to the job on offer. Interview questions such as 'when did you leave high school?'⁷⁰ or 'how old are your children?'⁷¹ reveal unnecessary age-based information that can allow unlawful discrimination to occur.

Take the following examples of potentially 'age inappropriate' recruitment practices:

Examples: Recruitment practices

A 58 year old applied for a store position and was asked questions in the interview about whether he could work with young people and how long he planned to work for. He was unsuccessful in getting the job.

A 50 year old applied for a position with a company. During the interview a panel member asked 'what do you want this job for at this late stage of your life?'. The person was unsuccessful in getting the job.

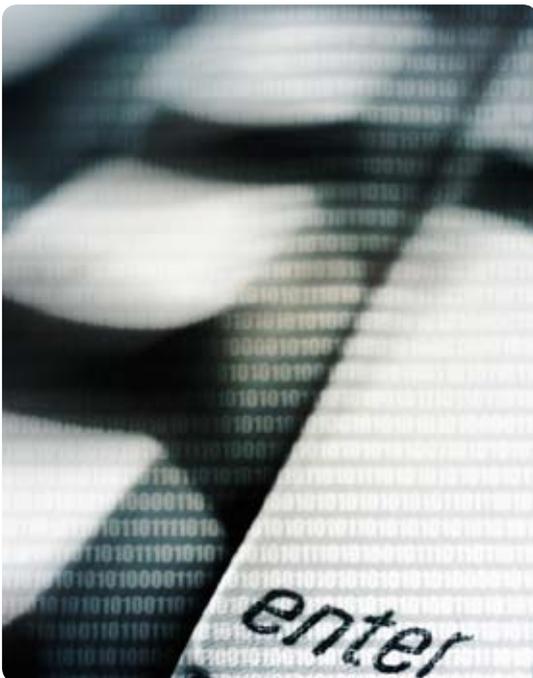
A 45 year old applied online for a position as a casual salesperson through the employer's website. He did not receive an interview and he sought feedback on the reasons for this. He was then offered an interview at which he claimed the store manager told him that his application had not initially been forwarded because he was 'too old'.

As these examples illustrate, some recruiters commonly screen applicants according to age at the initial stage of application.⁷² One 54 year old had worked as a contractor in the IT industry, which was an arrangement that worked well until he hit the age of 45. Since turning 45, he noticed a clear recruitment pattern in his job search activity – if he applied for a job advertised by a recruitment agency he didn't hear anything. On the other hand, if he applied for a job advertised directly by an employer, his chances of getting an interview were quite good. This situation was made worse by the fact that most IT contract positions were advertised by recruitment agents.⁷³

Research and consultations show that a number of people over 45 years of age feel they are pre-judged and rejected for reasons such as not 'fitting into the environment'⁷⁴ or for being 'too qualified'.⁷⁵ This can be made worse by what some describe as the general tendency of people to recruit people from their own age group.⁷⁶ Some managers may prefer to hire younger workers to make sure

that their own power or authority lines are kept clear.⁷⁷ We heard that on the one hand, some employers may recruit people based on a rigid ‘absolute skills fit’ model where if a person does not have the exact skills required, there is no leeway given.⁷⁸ On the other hand, even where a mature age person has the exact skills needed for the job, it may not lead to employment either.

We heard that discriminatory recruitment practices can contribute to one of *the* most difficult barriers facing mature age workers – their inability to re-enter the workforce.⁷⁹ For example, someone might accept a voluntary redundancy assuming they will quite easily be able to find another job, only to discover they just cannot get back into the job market. If one considers that as of July 2010, 38% of long term job-seekers are over the age of 40 years,⁸⁰ discriminatory recruitment practices like these not only represent a serious problem to mature age workers but have implications for the productivity of our nation as a whole.



4.2 Age discrimination in employment

Even in situations where mature age workers are in employment, forms of age discrimination can be found. We have heard that mature age workers can be viewed by managers and co-workers as less efficient, less trainable and less valuable than people who are younger than them. In the workplace these types of stereotypes can have a number of consequences in regards to:

- Access to training and promotions;
- Insecure/uncertain employment arrangements;
- Redundancy and restructure practices;
- Flexible workplace arrangements; and
- Age-based bullying and harassment.

(a) Access to training and promotions

Mature age workers can be denied access to promotions and training because of the stereotype that they offer only ‘limited returns’. For example, Australian research has revealed a tendency among some managers to stereotype older women as ‘loyal but lacking potential’.⁸¹ This stereotype makes it less likely that older women will have access to promotion opportunities.⁸² On the other hand, younger men can be stereotyped as not being competent at the job but having ‘potential’.⁸³ As such they were more likely to have access to training opportunities. As one mature age woman put it:

I feel like I am ‘tolerated’ and that people think I’m past my use-by date and should retire. Sometimes comments are made like ‘can you keep up?’ This manifests itself in being overlooked for training courses which are instead given to the younger people. It is never explicit but rather explained away as younger people being the priority. Yet I feel like I need the training update just as much.

(b) Insecure/uncertain employment arrangements

Age discrimination can also be used to trap mature age workers in more precarious or vulnerable forms of employment like casual or temporary arrangements.⁸⁴ As one mature age worker, who wrote to the Commission, observed:

Another part of this discrimination is the common practice of many employers offering sub-standard wages and conditions to older persons...in this last week I was offered a skilled job but at a wage level that was less than when I was an apprentice 39 years ago. I turned the job down.

A 60 year old woman who was employed as a lecturer at an education institution for a number of years on a series of fixed term contracts brought a complaint to the Commission. She claimed she had been referred to as 'at the end of my career and at retirement age' and her contract was consequently not renewed.

In addition to potentially being confined to casual or temporary contract positions, mature age workers are more likely to find they are 'underemployed' for longer.⁸⁵ This means not being able to secure the hours of work that they need which can result in higher levels of financial stress and insecurity. While, on average, underemployment is generally more common among younger workers, older Australian workers experience longer periods of underemployment.⁸⁶ In September 2009, almost half (48%) of part-time underemployed people aged 45-54 years, and 45% of those aged 55 years and over, had been underemployed for one year or more.⁸⁷

(c) Redundancy and restructure practices

Redundancy and restructure practices can also be used by some employers to demote or force mature age workers out of the workplace.

Research suggests that, when businesses restructure, mature age workers are often targeted.⁸⁸ See the following examples:

Examples: Redundancy and restructure practices

A 64 year old worked for 14 years as a permanent full-time sales team leader. Her employer told her a consultant had assessed the business and her position would no longer exist due to the restructure. Yet a person was subsequently employed to perform the same role and duties – the new person was in their thirties.⁸⁹

A 60 year old was employed full-time as an advisor. His employer mentioned that they had heard he was retiring. He told them this was not the case. Subsequently he was informed his hours were being reduced because of a restructure. A new person was then hired to perform his role full-time.⁹⁰

A worker in the 45 to 59 year age group worked as a manager in a company for over 20 years. The company restructured and the worker was told that he would be replaced by someone with higher IT skills (he was not offered the opportunity to upgrade his skills). He was instead offered a job as a driver with a \$20 000 salary cut.⁹¹

Redundancy arrangements can be based on perceptions that mature age workers should not expect to remain in the workforce. Due to their potential access to pension entitlements and superannuation, they are perceived as better able to adjust to job loss than younger workers.⁹² A study in the United Kingdom found mature age workers could be placed under pressure from management and co-workers to take redundancy or early retirement.⁹³ This raises broader questions about whether mature age workers always choose an 'early retirement' or are being pressured into a forced redundancy.⁹⁴ Where this occurs situations of hidden unemployment are created.

(d) Flexible workplace arrangements

Mature age workers can have limited ability to negotiate flexible and phased retirement arrangements within the workplace. The Commission was told during consultations that for some mature age workers, their caring responsibilities (such as caring for parents, spouses, siblings and adult children) were not as commonly recognised or afforded real legitimacy within the everyday reality of Australian workplaces.⁹⁵ This was despite existing legal protections. Yet research shows that older people in Australia are a significant source of informal care for both family and friends.⁹⁶

Phased retirement arrangements (such as a three day week) can be used as a work-life balance tool by older workers.⁹⁷ Where difficulties exist in requesting phased retirement options, the result can be less work or being forced out of the job altogether due to pressures from increasing caring responsibilities.⁹⁸

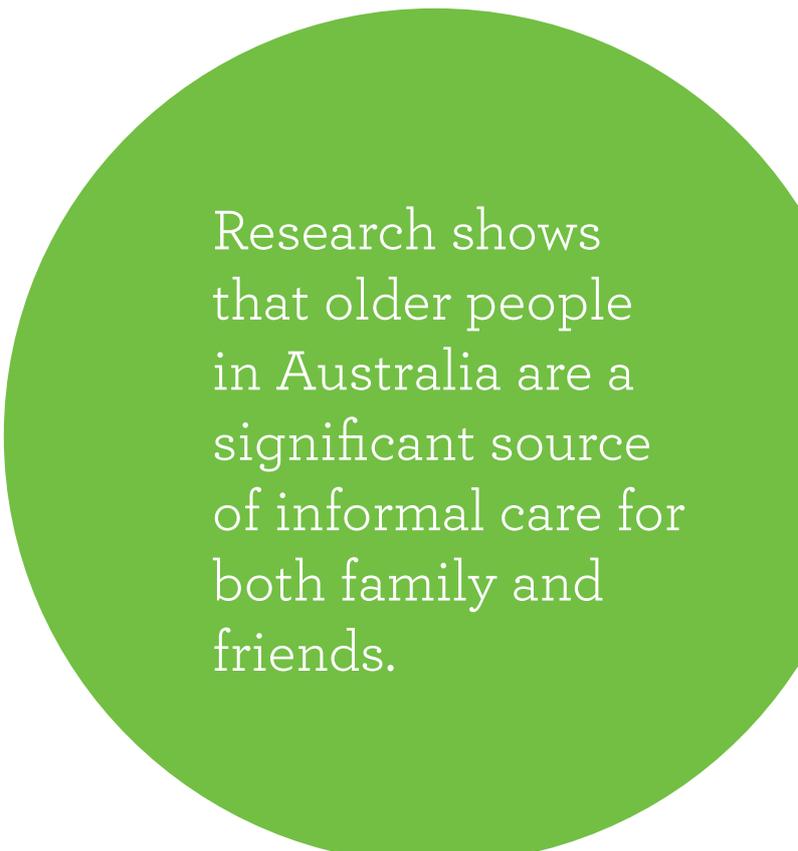
(e) Age-based bullying and harassment

Another disturbing trend is the occurrence of age-based bullying and harassment against mature age workers in the workplace. The Commission has heard from mature age workers who have been hassled by employers and co-workers about 'retirement' once they reach the age of 60 or who have been the target of hints, comments and jokes about retiring, menopause and leaving due to 'getting too old'. One report noted that bullying and harassment could take the form of 'ignoring and isolating' the worker and making life difficult for them by, for example, not giving them enough time to learn new skills.⁹⁹

Example: age-based bullying and harassment

A 60 year old worker recounted how he worked as a machinist for a small manufacturing firm for a number of years. He was put under a lot of pressure to retire. His employer either ignored him or constantly told him it was time to leave as he was too old. This made him feel intimidated and like 'chucking it all in'. At the time the harassment had been going on for six months.¹⁰⁰

There are many stories like these and the impacts of these forms of age discrimination, both economically and socially, should not be underestimated. Quite apart from the obvious productivity costs in missing out on valuable skills and talent, the human cost of this situation can be brutal and relentless.



Research shows that older people in Australia are a significant source of informal care for both family and friends.

5 Impacts of age discrimination – what are the consequences?

We have considered how mature age workers can experience discrimination in their everyday lives. But what can be the impact of unlawful discrimination? What can be the real consequences of the behaviour and practices that support unlawful age discrimination? Why is it important that we try and eliminate it? This section will consider three impacts or ‘costs’ of ageism and age discrimination in the workplace:

- Economic cost;
- Social cost; and
- Psychological cost.

5.1 The economic cost of age discrimination in employment

Australia faces a number of well documented economic and social challenges over the coming years. Chief among these challenges is that of maximising the full potential of the workforce as the age and composition of Australia’s population changes.¹⁰¹

The workforce participation rate for mature age workers in Australia is lower than our counterparts in other key OECD countries including Canada, the United Kingdom and New Zealand.

The federal Department of Treasury describes the ‘three P’s’ of economic growth as population, participation and productivity.¹⁰² The ‘three P’s’ are seen as the factors that can assist in meeting Australia’s future challenges and increasing our prosperity.¹⁰³ The Australian Productivity Commission has stated that ‘higher economy-wide productivity and participation rates are the keys to future economic growth’.¹⁰⁴ So, in situations where mature age workers are forced out of work or are underemployed because of unlawful age discrimination, this may have the effect of limiting both our productivity and the growth of the Australian economy. Coupled with the landmark policy change of the staged increase in the age pension age to 67,¹⁰⁵ the federal government is sending a strong signal that the expectation now is that workers will work for longer. But can they?

It is vital to national productivity that all people in Australia who want, or need, to be in paid work are able to do so to the maximum of their skills, abilities and aspirations – regardless of their age. Yet mature age workers remain an under-utilised part of the labour force in Australia. The workforce participation rate for mature age workers in Australia is lower than our counterparts in other key OECD countries including Canada, the United Kingdom and New Zealand.¹⁰⁶

Unlawful age discrimination can result in increased and unnecessary demands on the social security system. While all people have the right to social security,¹⁰⁷ all people also have a right to work free from discrimination and on just and favourable conditions.¹⁰⁸ We have heard that where mature age workers want to work, but cannot because of discrimination, some are forced to rely on social security.¹⁰⁹ Not only can unlawful age discrimination decrease national productivity but it can also effectively place pressures on the welfare system that could otherwise be avoided. As of July 2010, over one third of long term job-seekers on the NewStart allowance were over the age of 40 years.¹¹⁰ This shows that mature age workers represent a significant proportion of people who are in receipt of social security payments but are unable to find work.

The federal government's 2010 Intergenerational Report predicts that increasing the participation of mature age workers by 5% in the next 40 years would increase Australia's real GDP per capita by 2.4%.¹¹¹ Similarly, work by the Australian Productivity Commission shows that increasing the participation rates of mature-age men and women could increase per capita GDP growth.¹¹²

When mature age workers are unable to get the hours of work that they need or want, it leads to underemployment. The underemployment of mature age workers represents yet another setback to productivity and participation which Australia can ill afford. In Australia, as of November 2009, there were 156 300 workers aged between 45 and 54 and 101 500 aged over 55 who were underemployed.¹¹³ This includes mature age workers who want, and are available for, more hours of work than they currently have. They might be people employed part-time who want more hours or people employed full-time who have worked part-time hours for economic reasons (such as agreeing to reduced hours during a market downturn).¹¹⁴ Also, as discussed earlier, mature age workers experience longer periods of underemployment than younger workers.¹¹⁵

A link can be drawn between the consequences of unlawful age discrimination as a barrier to paid work and the economic costs described above. Increasing the ability of mature age workers, who want or need to participate in paid work to do just that has a double benefit – increasing national productivity and decreasing dependence on the social security system.

5.2 The social cost of age discrimination in employment

Unlawful age discrimination does not just create economic costs. It can also have an important social cost – it can increase the risk that individuals will be living in poverty in their later years. Without the opportunities to access and fully participate in paid employment, people can be forced to rely on a pension in their later years of life. We were informed of one man who in eight years had applied for over 500 jobs and received only four interviews.¹¹⁶ At one interview he was told he was over-qualified and would be totally fed up with what they were offering within a week.¹¹⁷ Finally, due to the lack of job prospects and his experiences over the last eight years, he registered for the age pension soon after he became eligible.¹¹⁸

As mentioned earlier, under international human rights law people have the right to social security and to an adequate standard of living.¹¹⁹ In 2009, more than one in four older people were living in poverty.¹²⁰ At this time, Australia had the fourth highest old-age poverty rate among OECD countries – more than double the OECD average.¹²¹ Australians aged over 50 are making up an increasing number of the people living in poverty in our country. If one looks at the period between 1990 and 2000, in what was a time of strong economic growth, the proportion of people living in poverty who were aged over 50 increased from one quarter to one third.¹²²

Recent Australian research suggests that almost half of single older people are living in poverty.¹²³ In particular, single, older females experience the highest rate of poverty when compared to other groups and are at the greatest risk of ongoing poverty.¹²⁴

Poverty in older age is widely experienced in Australia¹²⁵ and this can have particular consequences for older people. The difficulty people in poverty face in covering basic expenses including food, housing, utilities, clothing and health costs not covered by Medicare increases pressure on government resources. It can also increase the financial and psychological stress experienced by older people who live in poverty.



Recent Australian research suggests that almost half of single older people are living in poverty. In particular, single, older females experience the highest rate of poverty when compared to other groups and are at the greatest risk of ongoing poverty.

5.3 The psychological cost of age discrimination in employment

While there are strong messages from the government that people should be working to at least 67 years of age, people over 45 can simultaneously face invisible and accepted barriers to their recruitment and continued employment. Where unlawful age discrimination operates to deny mature age workers access to paid, quality employment there can be mental health impacts that result from being marginalised and/or locked out of paid employment opportunities. Quite apart from the impacts of serious financial stress, the loss of sense of self and the perceived status people gain from being in quality paid work¹²⁶ has been linked to inactivity, cognitive decline,¹²⁷ depression and social isolation.¹²⁸ This troubling issue is highlighted in a number of comments the Commission has received from mature age workers.

Examples: psychological impacts of age discrimination

One mature age woman who lost her position after being told that there were too many older teachers at the school said she, 'lost a sense of who I was right there and then'. She felt like it was an 'overwhelming kick in the guts' – she did not consider that her age would be a factor in deciding whether she got or kept a job. She took on emergency relief teaching, but did not pursue any ongoing full-time work as she felt she could not face the rejection again. This left her financially vulnerable and she had to borrow money against her mortgage to get through Christmas with her two kids.

An unemployed 52 year old man described not working as affecting 'our own self worth' and as impacting 'on people's overall well being'.

An unemployed man in his 50's who tried repeatedly and unsuccessfully to get into paid employment spoke about the relentless impact on his self-esteem with the receipt of each job application rejection letter. Having been forced out of paid work and onto the age pension, this man admitted to feelings of depression and social isolation.¹²⁹

When we consider the importance of a positive attitude in applying for jobs, as well as in the interview process, where low self-esteem exists among mature age job seekers, it is easy to see how it could impair their chances of success.¹³⁰

Worse still, research shows that some mature age workers can themselves come to believe negative age-based stereotypes.¹³¹ This then has the consequence of undermining their own attitudes towards future job seeking prospects¹³² and trainability.¹³³ A mature age person may even start to believe that they are no longer 'dynamic and innovative' or that they are 'past it' and so they may not bother applying for certain jobs. In this situation re-entry into the workforce is then seen and accepted by them as impossible from the outset. The logical consequence of this process of self-selecting out of job opportunities is that it can accelerate both entrenched long term unemployment and poverty and can be detrimental to overall mental health. This represents a terrible downward spiral that is exacerbated by unlawful age discrimination and the ageist attitudes that further entrench these practices.

6 Conclusion

The paper has looked at the systemic nature of ageism as it can impact on older people within our community. It has looked at one of the root causes of what appears to be a deeply entrenched and accepted form of discrimination – age discrimination. We have seen how age-based generalisations can be used to stereotype diverse groups of people and to strip them of their individuality and of their choices. In particular we have looked at how mature age workers can be affected by unlawful age discrimination and the many different ways this can occur across the work-life cycle. We have also considered the legal protections that currently exist and the ways people can enforce their rights. When unlawful age discrimination is encountered in employment, it can lead to detrimental financial and social outcomes for mature age workers, lost productivity for employers and greater reliance on social security for governments. As a society we are significantly lessened by all forms of unlawful discrimination.

But these problems are not unsolvable. Societies that experience these problems can change, adapt and evolve. Solutions to the problems of unlawful age discrimination and the treatment of mature age workers can be found in the groundswell of a social movement

of the kind that has built awareness of other forms of discrimination in our society.

It can be changed through a greater awareness of our rights. Strengthening and reform of laws and policies, much-needed further research and awareness-raising education campaigns must be core initiatives if we are to confront systemic age discrimination. However, individual action is also important. We must start outing age discrimination whenever we see and experience it – whether it be by pointing it out to friends, family, co-workers and managers, by lobbying members of Parliament or by making a complaint either to management, to state and territory equal opportunity agencies, or to the Australian Human Rights Commission. These are all actions that can assist in creating change.

Through these kinds of actions a necessary level of choice and control can be returned to the lives of mature age workers – which is essential to ensuring dignity and respect. We can take real steps to eradicate age discrimination in our workplaces and to eradicate the acceptability of ageism in all spheres of life. With age equality as our goal, we will also be taking steps to ensure that human rights are respected and protected equally in a society that is truly inclusive of us all.



- 1 See *International Covenant on Economic, Social and Cultural Rights*, 1966, arts 2, 6 & 7 (ICESCR). At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 18 August 2010). Australia ratified the ICESCR on 10 December 1975.
- 2 Australian Human Rights Commission, *Annual Report 2008-09* (2009), p 79. At http://www.humanrights.gov.au/about/publications/annual_reports/2008_2009/index.html (viewed 18 August 2010).
- 3 Australian Human Rights Commission, above, p 78.
- 4 Australian Bureau of Statistics, 3222.0 - Population Projections, Australia, 2006 to 2101 (2008). At <http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0> (viewed 8 September 2010).
- 5 See: Consultations M3, M6, M7& M16; COTA Over 50s, *Briefing Paper - Age discrimination and mature workforce issues* (2008), p 5.
- 6 Australian Bureau of Statistics, *1301.0 - Year Book Australia, 2005* (2005). At <http://www.abs.gov.au/Ausstats/abs@.nsf/o/D4CD96E96875500DCA256F7200833041?Open> (viewed 1 September 2010).
- 7 Consultation M2-1.
- 8 R Butler & M Lewis, *Aging & Mental Health: Positive psychosocial and biomedical approaches* (3rd ed, 1982), p xvii.
- 9 J Macnicol, *Age Discrimination: An historical and contemporary analysis* (2006), p 5.
- 10 Macnicol, above, pp 9-10.
- 11 Macnicol, above, pp 5 & 8.
- 12 I Glover & M Branine, "Do Not Go Gentle Into That Good Night": Some thoughts on paternalism, ageism, management and society' in I Glover & M Branine (eds), *Ageism in Work and Employment* (2001), p 51.
- 13 T Calasanti, 'Ageism, Gravity and Gender: Experiences of aging bodies' (2005) 29(3) *Generations* 8, p 11.
- 14 Calasanti, above.
- 15 R Wood, 'Attacking Ageism in Advertising' (1989) 45 *Media & Values*. At http://www.medialit.org/reading_room/article523.html (viewed 18 August 2010).
- 16 Wood, above.
- 17 Consultation M13-1.
- 18 M Pasupathi & C Löckenhoff, 'Ageist Behaviour' in T Nelson (ed), *Ageism: Stereotyping and prejudice against older persons* (2002), pp 205-6.
- 19 L Matthews, S Sceats, S Hosali & J Candler, *The Human Rights Act - Changing Lives*, British Institute of Human Rights (2nd ed, 2008), p 15.
- 20 Specifically the right to respect for private life, which emphasises the importance of dignity and autonomy, and the right not to be treated in a degrading way. See: *Human Rights Act 1998* (UK), art 8; Matthews, Sceats, Hosali & Candler, above.
- 21 Matthews, Sceats, Hosali & Candler, above.
- 22 J Wilkinson & K Ferraro, 'Thirty Years of Ageism Research' in T Nelson (ed), *Ageism: Stereotyping and prejudice against older persons* (2002), pp 344-5.
- 23 See, for example, Children Now, *Fall Colors: Prime time diversity report* (2001). At http://www.childrennow.org/uploads/documents/fall_colors_2001.pdf (viewed 18 August 2010) which reports that only 3% of prime time characters were over the age of 70 years; E Kessler, K Rakoczy & U Staudinger, 'The Portrayal of Older People in Prime Time Television Series: The match with gerontological evidence' (2004) 24(4) *Ageing and Society* 531.
- 24 Wilkinson & Ferraro, note 22, p 345.
- 25 See, for example: Consultations M1, M7; W Loretto, C Duncan & P White, 'Ageism and Employment: Controversies, ambiguities and younger people's perceptions' (2000) 20(3) *Ageing & Society* 279, p 280; Macnicol, note 9; Glover & Branine, note 12.
- 26 See Macnicol, note 9, p 16.
- 27 Consultation M13-1.
- 28 COTA Over 50s, note 5, p 5.
- 29 Consultation M1-1.
- 30 See Macnicol, note 9, p 6.
- 31 P Herriot, 'The Plateaued Manager: The anatomy of an ageist stereotype' in I Glover & M Branine (eds), *Ageism in Work and Employment* (2001), p 65.
- 32 Consultations M6-2 & M13-1.
- 33 See Australian Safety and Compensation Council, *Are People with Disability at Risk at Work? A review of the evidence* (2007), p 2. At <http://www.safeworkaustralia.gov.au/NR/rdonlyres/262E0DA1-4BBC-44ED-A617-1CC1B2ECE853/0/ArePeopleWithDisabilityatRiskatWork.pdf> (viewed 8 September 2010).
- 34 See Herriot, note 31, p 72.
- 35 D Sargeant, 'Confronting Ageism Towards a Society for All Ages' (The Sixth Sir John Quick Bendigo Lecture delivered at Latrobe University, Bendigo, 14 October 1999).
- 36 See Macnicol, note 9, p 23.
- 37 See Macnicol, note 9, p 6.
- 38 Butler & Lewis, note 8.
- 39 Australian Law Reform Commission, *Equality Before the Law: Justice for women*, Report 69(1) (1994), para 3.29.
- 40 R Hunter, *Indirect Discrimination in the Workplace* (1992), p 13.
- 41 Hunter, above pp 5-6.
- 42 Hunter, above.
- 43 Hunter, above.
- 44 Respectively, the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Sex Discrimination Act 1984* (Cth). Each state and territory has anti-discrimination laws which exist alongside all federal discrimination Acts and provide additional avenues for pursuing discrimination complaints.
- 45 *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 (1948), art 25(1).
- 46 See *International Covenant on Civil and Political Rights*, 1966, arts 2(1) & 26. At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 18 August 2010).
- 47 'The Human Rights Committee has accepted that 'any other status' encompasses discrimination based on age'. See *Schmitz-de-Jong v Netherlands*, Communication No 855/1999 (16 July 2001) and *Love v Australia*, Communication No 983/2001 (25 March 2003) cited in S Joseph, J Schultz & M Castan, *International Covenant on Civil and Political Rights: Cases, materials and commentary* (2nd ed, 2004), para 23.24. See also Committee on Economic, Social and Cultural Rights, *General Comment 6 - The economic, social and cultural rights of older persons*, UN Doc E/1996/22 (1995). At <http://www.unhchr.ch/tbs/doc.nsf/o/482a0aced8049067c12563ed005acf9e?OpenDocument> (viewed 1 September 2010). The Committee considered and confirmed the issue of whether the prohibition of discrimination under article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* applies to discrimination on the grounds of age.

- 48 *Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources*, 1975, art 4. At <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C142> (viewed 8 September 2010).
- 49 *Age Discrimination Act 2004* (Cth), s 14.
- 50 *Age Discrimination Act 2004* (Cth), s 15.
- 51 *Age Discrimination Act 2004* (Cth), ss 19 & 20.
- 52 *Age Discrimination Act 2004* (Cth), s 18(5). Similar factors are provided for in the areas of discrimination against commission agents (s 19(4)), contract workers (s 20(3)) and partnerships (s 21(5)).
- 53 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 284.
- 54 *X v Commonwealth* (1999) 200 CLR 177, 189-90.
- 55 See the example given in the *Age Discrimination Act 2004* (Cth), s 42(1).
- 56 *Age Discrimination Act 2004* (Cth), s 35.
- 57 See *Age Discrimination Act 2004* (Cth), pt 4, div 4.
- 58 The Commission's concerns about a number of these exemptions were raised in its submissions to the Senate Legal and Constitutional Committee on the *Age Discrimination Bill 2003*. See Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Legislation Committee Inquiry on the Age Discrimination Bill 2003* (2003). At www.humanrights.gov.au/legal/submissions/age_discrimination.html (viewed 25 August 2010).
- 59 *Age Discrimination Act 2004* (Cth), s 33.
- 60 *Age Discrimination Act 2004* (Cth), s 6.
- 61 See Revised Explanatory Memorandum, *Age Discrimination Bill 2003* (Cth), pp 38-9.
- 62 See: Consultations M3 & M16; COTA Over 50s, note 5, p 5.
- 63 Consultations M6-2 & M3-2; A McGoldrick & J Arrowsmith, 'Discrimination by Age: The organizational response' in I Glover & M Branine (eds), *Ageism in Work and Employment* (2001), p 87; COTA Over 50s, note 5, p 4.
- 64 G Wood, A Wilkinson & M Harcourt, 'Age Discrimination and Working Life: Perspective and contestations - a review of contemporary literature' (2008) 10(4) *International Journal of Management Review* 425, p 436.
- 65 The Victorian, South Australian and Western Australian Equal Opportunity Commissions and the Australian Employers Convention, *Age Limits: Age-related discrimination in employment affecting workers over 45* (2001), p 5.
- 66 McGoldrick & Arrowsmith, note 63, p 87.
- 67 M Bittman, M Flick & J Rice, *The Recruitment of Older Australian Workers: A survey of employers in a high growth industry*, SPRC Report 6/01, Social Policy Research Centre, University of New South Wales (2001), p 15.
- 68 Human Rights & Equal Opportunity Commission, *All About Age Discrimination* (2008).
- 69 Victorian Equal Opportunity Commission et al, note 65, p 7.
- 70 Bittman, Flick & Rice, note 67, p 52.
- 71 Victorian Equal Opportunity Commission et al, note 65, p 7.
- 72 Victorian Equal Opportunity Commission et al, above.
- 73 See generally Australian Computer Society Ageism Task Force, *Improving Age Diversity in the ICT Workforce* (2010), p 9.
- 74 Consultation M3-2.
- 75 Victorian Equal Opportunity Commission et al, note 65, p 7.
- 76 Consultation M3-2.
- 77 McGoldrick & Arrowsmith, note 63, p 92.
- 78 Consultation M3-4.
- 79 Consultations M1-5, M19-2, M15-2, M17-5, M9-2, M18-2, M22-3 & M23-2.
- 80 Department of Education, Employment and Workplace Relations, *Labour Market and Related Payments Publication: A monthly profile* (July 2010), p 8. At <http://www.workplace.gov.au/workplace/Publications/LabourMarketAnalysis/LabourMarketandRelatedPaymentsMonthlyProfile.htm> (viewed 1 September 2010).
- 81 B Partridge, 'Avoiding Stereotypes' (2008) *Management Today* 22, p 24.
- 82 Partridge, above.
- 83 Partridge, above.
- 84 Consultation M1-3.
- 85 National Seniors Australia Productive Ageing Centre, *Experience Works: The mature age employment challenge*, Department of Health and Ageing (2009), p 11.
- 86 Australian Bureau of Statistics, 'Older Australian Workers Experience Longer Spells of Insufficient Work', (Media Release, 23 February 2010). At <http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/2E6CC1E17EACAB55CA2575660016933B?OpenDocument> (viewed 18 August 2010).
- 87 Australian Bureau of Statistics, above.
- 88 L Windsor, J Spoehr & P Wright, *Workforce Development Strategies and Older Workers in Australia* (Refereed paper to the Transitions and Risk: New Directions in Social Policy Conference, University of Melbourne, Melbourne, 23-25 February 2005), p 5. See also Bittman, Flick & Rice, note 67, p 12.
- 89 JobWatch, *Workplace Conditions and Practices: Barriers to older persons participation* (2009), p 12.
- 90 JobWatch, above, p 14.
- 91 JobWatch, above.
- 92 Bittman, Flick & Rice, note 67, p 12.
- 93 A Walker, 'Ageism in the British Labour Market' in J Habib & C Nusberg (eds), *Rethinking Worklife Options for Older Persons* (1990) cited in Bittman, Flick & Rice, above.
- 94 Bittman, Flick & Rice, above.
- 95 Consultation M12-2.
- 96 Australian Institute of Health and Welfare, *Older Australia at a Glance*, Department of Health and Ageing (4th ed, 2007), p 32. At <http://www.aihw.gov.au/publications/index.cfm/title/10402> (viewed 25 August 2010).
- 97 S Devisscher & D Sanders, 'Ageing and Life-course Issues: The case of the career break scheme (Belgium) and the life-course regulation (Netherlands)' in A D'Addio, P Whiteford & the Organisation for Economic Cooperation and Development, *Modernising Social Policy for the New Life Course* (2007), p 118.
- 98 COTA Over 50s, note 5; Consultation M12-2.
- 99 JobWatch, note 89, p 10.
- 100 JobWatch, above, p 12.
- 101 Australian Human Rights Commission, *Submission to the Inquiry into the Equal Opportunity for Women in the Workplace Act 1999 and Equal Opportunity for Women in the Workplace Agency* (2009), p 29. At http://www.hreoc.gov.au/legal/submissions/2009/20091030_EOWA.html#Heading481 (viewed 25 August 2010).

- 102 The Australian Government Treasury, *Australia to 2050: Future challenges*, Intergenerational Report (2010), p 21. At <http://www.treasury.gov.au/igr/igr2010/default.asp> (viewed 25 August 2010).
- 103 The Australian Government Treasury, above.
- 104 Productivity Commission, *Economic Implications of an Ageing Australia*, Research Report (2005), p 303.
- 105 Minister for Families, Housing, Community Services and Indigenous Affairs, 'Secure and Sustainable Pension Reform: Age pension age' (Media Release, 12 May 2009). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/age_pension_12may2009.aspx (viewed 8 September 2010).
- 106 In 2008 Australia's labour force participation rate for 45-54 year olds (82.9%) was lower than some key OECD countries including Canada (85.7%), the United Kingdom (84.7%) and New Zealand (86.5%). For the same period, Australia's rate for 55-64 year olds (58.9%) was lower than some key OECD countries including Canada (60.8%), the United Kingdom (59.9%), the United States (64.5%) and New Zealand (73.2%). See Organisation for Economic Cooperation and Development, *OECD Stat Extracts*, http://stats.oecd.org/Index.aspx?DatasetCode=LFS_SEXAGE_I_R (viewed 25 August 2010).
- 107 See *International Covenant on Economic, Social and Cultural Rights*, 1966, art 9. At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 18 August 2010).
- 108 See *International Covenant on Economic, Social and Cultural Rights*, 1966, arts 2, 6 & 7. At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 18 August 2010).
- 109 Consultation M13-2.
- 110 38%. See Department of Education, Employment and Workplace Relations, note 80.
- 111 The Australian Government Treasury, note 102, pp 29-30. The definition of 'mature age' used in the report seems to rely on the OECD participation rate for 55 to 64 year old persons.
- 112 Productivity Commission modelling shows that, if achievable, increasing the participation rate for men over 55 by 10 points could increase per capita GDP growth to 2044-45 by 1.5%. Increasing older women's labour participation rates to match men's could increase per capita GDP growth to 2044-45 by an additional 1.5%. Productivity Commission, note 104, p 136.
- 113 Australian Bureau of Statistics, *6202.0 - Labour Force, Australia, Jan 2010, Table 20*, <http://www.abs.gov.au/AUSSTATS/abs@nsf/DetailsPage/6202.0Jan%202010?OpenDocument> (viewed 25 August 2010).
- 114 See M Janda, 'Low Unemployment Masks Army of Underemployed', *ABC News*, 23 February 2010. At <http://www.abc.net.au/news/stories/2010/02/23/2827947.htm> (viewed 1 September 2010).
- 115 Australian Bureau of Statistics, *6265.0 - Underemployed Workers, Australia, September 2009* (2010), p 6. At www.abs.gov.au/AUSSTATS/abs@nsf/DetailsPage/6265.0Sep%202009?OpenDocument (viewed 25 August 2010).
- 116 J Redman, *An analysis of policy with regard to age discrimination in employment and the workplace*, University of the Sunshine Coast, Doctoral Study (October 2008).
- 117 Redman, above.
- 118 Redman, above.
- 119 See *International Covenant on Economic, Social and Cultural Rights*, 1966, arts 9 & 11. At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 18 August 2010).
- 120 Organisation for Economic Cooperation and Development, *Australia: Highlights from OECD Pensions at a Glance 2009* (2009). At www.oecd.org/dataoecd/8/61/43071222.pdf (viewed 25 August 2010). The term 'older people' here refers to those persons aged over 65 years.
- 121 Organisation for Economic Cooperation and Development, above.
- 122 A Harding, R Lloyd & H Greenwell, *Financial Disadvantage in Australia 1990 to 2000: The persistence of poverty in a decade of growth*, The Smith Family & NATSEM (2001), p 17. At www.thesmithfamily.com.au/webdata/resources/files/Financial_Disadvantage_Report_Nov_2001.pdf (viewed 25 August 2010).
- 123 R Tanton, Y Vidyattama, J McNamara, Q Ngu Vu & A Harding, 'Old, Single and Poor: Using microsimulation and microdata to analyse poverty and the impact of policy change among older Australians' (2009) 28(2) *Economic Papers (Sydney)* 102, p 103.
- 124 The poverty measurement tool for this study is 50% of the median income poverty line. B Heady & D Warren, *Families, Incomes and Jobs, Volume 3: A statistical report on waves 1 to 5 of the HILDA Survey* (2008), p 55. At <http://www.melbourneinstitute.com/hilda/statreport/statreport-v3-2008.pdf> (viewed 25 August 2010).
- 125 See: Tanton, Vidyattama, McNamara, Ngu Vu & Harding, note 123; Heady & Warren, above.
- 126 Consultation M1-3.
- 127 Consultation M1-3.
- 128 Consultation M6-2.
- 129 Redman, note 116.
- 130 Consultation M3-5. See generally: G Waddell & K Burton, *Is Work Good for Your Health & Well-being?* (2006); R Binstock & L George (eds), *Handbook of Aging and the Social Sciences* (5th ed, 2001), p 187.
- 131 See Victorian Equal Opportunity Commission et al, note 65, p 7; H Sterns & D Doverspike, 'Aging and the Training and Learning Process' in I Goldstein (ed), *Training and Development in Organizations* (1989), pp 325-6 cited in N Charness & S Czaja, *Older Worker Training: What we know and don't know*, AARP Public Policy Institute (2006), p 10; Consultation M1.
- 132 Victorian Equal Opportunity Commission et al, note 65, p 7.
- 133 Sterns & Doverspike, note 131.

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Age discrimination – exposing the hidden barrier for mature age workers



The purpose of this paper is to look at and raise awareness and understanding of ageism and unlawful age discrimination against mature age workers within the workplace. This form of discrimination appears to sit quietly – it can go unnoticed and seems accepted. This paper aims to expose it. The paper explains what age discrimination and ageism are and what they can look like in Australian workplaces. It also outlines the often devastating impacts this form of discrimination can have on the lives of individuals, our communities and our nation as a whole. The paper explains how mechanisms, such as the Age Discrimination Act, can help to protect us from unlawful age discrimination and, more broadly, assist in tackling ageism within our community.

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