



Australian
Human Rights
Commission

Australia's protection of older persons with regard to equality and non- discrimination

**SUBMISSION BY THE AUSTRALIAN HUMAN RIGHTS
COMMISSION TO THE OPEN-ENDED WORKING GROUP
ON AGEING**

5 May 2017

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1 Introduction

1. The Australian Human Rights Commission makes this submission. The Commission is an 'A status' national human rights institution established and operating in full compliance with the Paris Principles. Information about the Commission can be found at: www.humanrights.gov.au.
2. The submission provides an overview of Australia's protection of older persons with regard to equality and non-discrimination.

2 Equality and non-discrimination protections available to older Australians under Australian legislation

3. In Australia, legislation exists at both a federal and state level to ensure equality before the law and eliminate discrimination on the basis of age in specific areas of public life.
4. In terms of federal legislation, the *Age Discrimination Act 2004* (Cth) (ADA) explicitly makes it unlawful to treat someone less favourably than another person in a similar situation because of their age, in a number of areas of public life. These areas include employment, education, accommodation and the provision of goods and services.
5. Under the ADA, unlawful discrimination can be classified either as direct or indirect. Direct age discrimination occurs when a person is treated less favourably than a person of another age would be treated in the same or similar circumstances because of their age.¹ Indirect age discrimination occurs when a rule or policy applies to everyone but has the effect of disadvantaging a person because of their age.²
6. Australian state anti-discrimination laws also prohibit discrimination on the basis of age in specific areas of public life.³ These prohibitions are formulated in a similar way to those contained in the ADA.
7. The Age Discrimination Commissioner is a statutory appointment made under the ADA.⁴ The appointment of Australia's first Age Discrimination Commissioner in 2011 has been an important step to focus attention on age discrimination and the rights of older people in Australia. The Hon Dr Kay Patterson AO, Australia's second Age Discrimination Commissioner was appointed in July 2016. The Commissioner is responsible for raising awareness of age discrimination, educating the community about the impact of age discrimination, and monitoring and advocating for the elimination of age discrimination across all areas of public life.

3 Willing to Work National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability

8. In 2016, the Commission conducted a National Inquiry and released the report *Willing to Work National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*. The Inquiry considered practices,

attitudes and Commonwealth laws that deny or diminish equal participation in employment and made recommendations to address employment discrimination against older Australians and Australians with disability.

9. As part of this Inquiry, the Commission held 120 public consultations, received 342 submissions, and met with over 1,100 people; including older Australians, Australians with disability, carers, advocates, community organisations, employers, businesses, trade unions, peak bodies and academics.
10. The Inquiry produced the following key data regarding older Australians:
 - People aged 55 years and over make up roughly a quarter of the population,⁵ but only 16% of Australia's total workforce.⁶
 - While mature-age people have a lower unemployment rate than younger people, they tend to have greater difficulty finding subsequent employment when they do become unemployed. In November 2015, the average duration of unemployment for mature-age people was 68 weeks, compared with 30 weeks for 15–24 year olds and 49 weeks for 25–54 year olds.⁷
 - The rise in mature-age long-term unemployment, coinciding with the increase in the average duration of unemployment, is of particular concern given that people who have been unemployed for a significant length of time, on average, face greater difficulty finding subsequent work.⁸
 - In 2015, 27% of people over the age of 50 had recently experienced discrimination in the workplace. One third of the most recent episodes of discrimination reported occurred when applying for a job. A third of those who had experienced age discrimination gave up looking for work.⁹
 - In 2014–15 the Commission received 1,102 enquires about age discrimination. 61.8% of enquiries and 70.9% of complaints about age discrimination were in the area of employment. Collectively, data from other state and territory anti-discrimination and equal opportunity agencies confirms that when an age discrimination complaint is reported, employment is one of the most common contexts in which older people make a complaint.¹⁰
11. The Inquiry also produced the following key findings:
 - Older Australians can feel 'shut out' of recruitment, be offered less professional development opportunities, or perceive that they are targeted for redundancy during periods of organisational restructure. Negative assumptions and pervasive stereotypes about older people contribute to these discriminatory practices.¹¹
 - Individuals who are subject to negative assumptions, stereotypes and discrimination can experience stress, and a decline in physical and

mental health. The experience can also diminish a person's self-confidence, self-esteem and motivation to remain in the workforce.¹²

- Employers may lack knowledge, awareness and skills to develop inclusive workplaces, implement recruitment and retention strategies to support older people and meet their legal and regulatory requirements. They may also be unaware of government programs and supports that can assist them. This contributes to barriers faced by older Australians in employment.¹³
- Some government policies and the operation of some government programs are not achieving their intended objectives and may be serving as a disincentive to workforce participation.¹⁴

4 Instances where differential treatment on the basis of age is explicitly justified

12. The ADA provides for a number of instances where differential treatment on the basis of age is explicitly justified. Division 4 of the ADA sets out the instances where treating someone differently on the basis of their age will not be considered unlawful. These exemptions include:
 - things done in compliance with Commonwealth laws, including laws about taxation, social security and migration
 - things done in compliance with state and territory laws
 - certain health and employment programmes
 - youth wages or direct compliance with industrial agreements and awards.
13. The ADA also says that it is not against the law to provide a genuine benefit to people of a particular age group or to do something that helps to meet an identified need of people of a certain age group. This is known as 'positive discrimination'. Section 33 of the ADA concerns positive discrimination, and provides that it is not against the law to discriminate on the basis of age if:
 - The act in question provides a genuine benefit to persons of a particular age, or;
 - the act is intended to meet a need that arises out of the age of persons of a particular age, or;
 - the act is intended to reduce a disadvantage experienced by people of a particular age.
14. Examples of positive discrimination as defined above with regard to older Australians include discounts and concessions for services, and/or the provision of additional notice entitlements in lieu of the fact that older Australians are often particularly disadvantaged by retrenchment.

¹ Age Discrimination Act 2004 (Cth) s 14.

² Age Discrimination Act 2004 (Cth) s 15.

³ *Discrimination Act 1991* (ACT) s 7(1)(b); *Anti-Discrimination Act* (NT) s 19(1)(d); *Anti-Discrimination Act 1991* (Qld) s 7(g); *Anti-Discrimination Act 1998* (Tas) s 16(b); *Equal Opportunity Act 2010* (Vic) s 6(a); *Equal Opportunity Act 1984* (WA) s 66V.

⁴ Age Discrimination Act 2004 (Cth) Pt 6A.

⁵ Australian Human Rights Commission, *Willing to Work National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, 2 May 2016. At <https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination> (viewed 18 April 2017), 11.

⁶ Australian Human Rights Commission, *Willing to Work National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, 2 May 2016. At <https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination> (viewed 18 April 2017), 11.

⁷ Australian Human Rights Commission, *Willing to Work National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, 2 May 2016. At <https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination> (viewed 18 April 2017), 11.

⁸ Australian Human Rights Commission, *Willing to Work National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, 2 May 2016. At <https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination> (viewed 18 April 2017), 11.

⁹ Australian Human Rights Commission, *Willing to Work National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, 2 May 2016. At <https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination> (viewed 18 April 2017), 11.

¹⁰ Australian Human Rights Commission, *Willing to Work National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, 2 May 2016. At <https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination> (viewed 18 April 2017), 11.

¹¹ Australian Human Rights Commission, *Willing to Work National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, 2 May 2016. At <https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination> (viewed 18 April 2017), 12.

¹² Australian Human Rights Commission, *Willing to Work National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, 2 May 2016. At <https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination> (viewed 18 April 2017), 12.

¹³ Australian Human Rights Commission, *Willing to Work National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, 2 May 2016. At <https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination> (viewed 18 April 2017), 12.

¹⁴ Australian Human Rights Commission, *Willing to Work National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, 2 May 2016. At <https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination> (viewed 18 April 2017), 12.