



**Submission by the  
Acting Commonwealth  
Ombudsman**

**AUSTRALIAN LAW REFORM  
COMMISSION:  
GREY AREAS – AGE BARRIERS TO  
WORK IN COMMONWEALTH LAWS**

Submission by the Acting Commonwealth Ombudsman, Ms Alison Larkins

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# THE COMMONWEALTH OMBUDSMAN

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The Commonwealth Ombudsman holds a unique position in the Australian administrative law landscape and is provided with an understanding of many individual experiences of members of the public, who are dissatisfied with the way that government has dealt with their issue. Over time, through investigating individual complaints about the actions of a particular Commonwealth department or agency, the Ombudsman's office is able to build up a detailed picture of an agency's operations and to observe what happens when legislation has unintended consequences.

## INTRODUCTION

The Australian Law Reform Commission (ALRC) has invited submissions in response to its Issues Paper, *Grey Areas – Age Barriers to Work in Commonwealth Laws* (Issues Paper 41), which seeks comments on whether the application and administration of Commonwealth laws are creating limitation on, or disincentives to, participation in the workforce by older persons.

The Issues Paper defines 'older persons' as anyone over the age of 45 years and focuses attention on particular areas of Commonwealth responsibility, namely:

- Age Pension
- Income tax
- Superannuation
- Social security
- Family assistance
- Child support
- Employment
- Workers' compensation and insurance
- Migration

Although we receive complaints from members of the Australian community concerning all of these areas of administration, only a portion of those complaints are relevant to the ALRC's enquiry. Further, we do not routinely ask our complainants for their dates of birth or age, so it is not always evident that the complainant is an older person.

In making this submission, we have primarily drawn upon our Centrelink (Department of Human Services) and Department of Employment, Education and Workplace Relations (DEEWR) complaints. Consequently we have only addressed those questions from the Issues Paper which relate to Centrelink and DEEWR services.

We recognise the importance of removing the barriers to older workforce participation and welcome this opportunity to respond to the ALRC's Issues Paper. We hope our submission may usefully inform the ALRC's response to government.

## RESPONSE TO TERMS OF REFERENCE

### Age Pension

#### IP 40: Question 4

In what ways, if any, should the Pension Bonus Scheme be changed to remove barriers to mature age participation in the workforce?

Although the Pension Bonus Scheme (PBS) is now closed to new participants, we continue to receive complaints from members of the community about the administration of the PBS.<sup>1</sup> In the main, people tend to complain they were not fully and properly informed about how the scheme works and that they have missed out on PBS funds as a result. We often become aware of these complaints when people ask us to review Centrelink's decision about their associated claim for compensation under the Compensation for Detriment caused by Defective Administration (CDDA) scheme.

As the following case study shows, this lack of understanding of the PBS may also lead some people to cease work before they otherwise would have.

#### **Case study 1: Lack of understanding contributes to premature retirement**

Mr C registered as an accruing member of the PBS on 26 February 2007. In June 2010, he spoke to Centrelink about PBS, age pension (AP) and rent assistance. On 2 September 2010, Mr C attended a meeting with a Centrelink Financial Information Services Officer. Mr C claimed that during these contacts with Centrelink he explained that he planned to cease work. Mr C ceased work and claimed AP and the PBS on 5 October 2010. On 22 October 2010, Mr C was granted the maximum rate of AP and a PBS payment of \$16,994. Mr C was paid less than the maximum amount of PBS because he had not remained in the scheme until the anniversary of the fourth year (bonus year), being 26 February 2011. Mr C claimed compensation and said he had not been made aware that ceasing work and claiming the PBS prior to the end of the bonus year would reduce his PBS payment; he had thought that it was sufficient to have completed the 960 hours of work to meet the requirements of the bonus year, even if he did so before the year had passed. Centrelink refused his CDDA claim. After investigation by this office and detailed correspondence with Centrelink, Centrelink decided to compensate Mr C for his financial loss.

<sup>1</sup> We have received 18 complaints about the PBS in this calendar year.

Another frequent ground of complaint is that a person was not made aware of the PBS even though they continued to work, or took up AP for a short time before they returned to employment. In each case that person is now unable to obtain the benefits of the PBS. It would appear that more could have been done to ensure more people were aware of the PBS and the effect that even a brief period of AP has on PBS entitlement, however this issue has been somewhat overtaken by the closure of the scheme.

**IP 40: Question 5**

How effective has the Work Bonus been in removing barriers to work for mature age persons? In what ways, if any, could it be improved?

While it appears from our complaints that many people welcome and utilise the Work Bonus scheme, some people complain that they do not understand how it works and others are frustrated that it does not apply to self-employed people.

**Case study 2: self-employed mature age worker**

Mrs P complained that she had been receiving AP for about four years and had utilised Work Bonus during that time, but had just learned that it did not apply to her self-employment activities. Mrs P had been advised in November 2011 that her Work Bonus was \$2750. She said the letter did not say anything about the self-employment exclusion and it said she could earn up to \$316 per fortnight without it affecting the rate of her AP. Mrs P teaches music privately to a small number of students. She informed Centrelink of her income but it was not until 3 March 2012 that she was sent a Work Bonus form to complete that she realised it did not apply to her circumstances. When she rang Centrelink to ask about this it was confirmed that the Work Bonus did not apply to her. She has committed to teaching these students but she and her husband will both receive a reduced pension as a result. Mrs P was unhappy that she would still have access to the Work Bonus if she had been employed in a casual service role, but could not utilise it for her self-employed teaching activities. Mrs P was referred to the CDDA scheme to lodge a claim.

The Work Bonus enables a person to earn up to \$250 a fortnight (capped at \$6,500 a year), without that income affecting their pension rate. This is a source of some complaint as some pension recipients earn less than the \$6,500 annual cap but are disadvantaged in the fortnights that their income goes over the \$250 limit for that fortnight. This is particularly problematic for people who work intermittently or intensively for short periods.

**Case study 3: seasonal work as Santa Claus**

Mr D worked as a Santa Claus over the Christmas period and earned \$3000. He makes use of the Work Bonus scheme and reported his fortnightly earnings to Centrelink. However, because the money was earned quickly over several fortnights, his pension was reduced. Mr C estimated that he would only earn \$5000 for the year. He complained that when \$5000 is divided between 26 fortnights, it comes to \$192 a fortnight, which is below the \$250 that the Work Bonus enables him to earn without affecting his pension. However, because Centrelink considers each fortnight's actual income, rather than annualising the income, his pension has been reduced in each of the fortnights he actually earned over \$250. Mr C was referred to Centrelink to lodge a complaint in the first instance.

## Superannuation

### IP 40: Question 20

What other changes, if any, should be made to superannuation laws, including tax laws, to remove barriers to mature age participation in the workforce?

From time to time we receive complaints from people who have had difficulty obtaining early release of their superannuation. For people who are not yet 55 years old, but who are in financial difficulty, early access to superannuation on the grounds of 'severe financial hardship' is an option available to them.

However, members of the community in this age group can only qualify for early release on this ground if they are in receipt of certain social security payments and have been in receipt of one or more of those payments for a continuous period of 26 weeks immediately prior to the application for early release.<sup>2</sup>

People in this situation may also try to obtain work. However, if that work causes their Centrelink payments to cease, or produces a zero rate payment in any fortnight, it will disrupt their status as payment recipients. If the work ceases or reduces and they return to payment, they will no longer be able to show that they have received a payment for a continuous period of 26 weeks unless they remain, uninterrupted, on the payment for a further 26 weeks.

Although we have not received complaints on this specific point, it does appear that if people who are in financial difficulty are aware of this rule but also wish to keep their option of seeking early release of superannuation open, they may decide to work less than they might have or not at all.

## Social Security

### IP 40: Question 21

A number of social security payments and entitlements may affect mature age persons' participation in the workforce or other productive work. In practice, how accessible to mature age persons is information about eligibility for such social security payments and entitlements?

We commonly receive complaints in which people say they have only just learned about a payment or entitlement that would have been of assistance to them earlier. This problem is not limited to mature age workers and reflects the complexity of the social security system as well as the difficulty departments have in ensuring that important messages are appropriately targeted and promoted.

As more emphasis is placed upon members of the public using online self-service facilities to conduct their government business, consideration must also be given to ensuring that those member of the public who do not, or cannot, utilise online services do not miss out on important information about their entitlements. It is also important that agencies retain accessible services, such as face-to-face and points for written correspondence, for customers with additional barriers, such as hearing and vision impairment or literacy challenges.

<sup>2</sup> People aged 55 years or more need only establish that they have received certain social security payments for a cumulative total of 39 weeks after 55. So for this group, seasonal or intermittent work that brings their payments to an end is not necessarily a bar to their ability to obtain their superannuation earlier.

We regularly receive complaints in which people say they were not fully informed of the consequences that taking up short term employment or increasing work hours would have upon their pension.

An example which commonly arises is where a person is in receipt of age pension or disability support pension (DSP) under the transitional rules.<sup>3</sup> The transitional rules apply to those Centrelink customers who were receiving the pension as at 19 September 2009 and who continued, without a break, to receive that pension for as long as the transitional rules provide a more favourable payment rate than the current rules. The transitional rules have a more favourable income test,<sup>4</sup> which is important for those pension recipients who have continued to do some work or whose partner receives employment income.

When the 2009 changes occurred, the letters to customers and public statements advised that people receiving a pension as at September 2009 would be 'no worse off' under the changes.

We have received complaints in which transitional rule customers have contacted Centrelink to ask about the potential effects of taking up a short term employment contract. Mechanisms exist to enable people to receive zero payment for a period of time, and then return to the pension if the employment ends.<sup>5</sup> Although this is often well explained to people, we have investigated cases in which it has not been made clear that the proposed employment activity or change to their regular income may result in the loss of transitional status. We have been involved in investigations which have resulted in Centrelink paying compensation to these people under the CDDA scheme.

In response to our concerns, Centrelink has deleted the phrase 'no worse off' from its communication materials, reviewed the information it provides to staff and to the public, and provided staff with training about the transitional rules.

In view of the recent Budget initiative which will enable disability support pension recipients to work up to 30 hours per week from 1 July 2012, we recently flagged the importance of ensuring that transitional rule DSP recipients are informed that changes to their work income could cause them to lose their transitional rate status. Although the increase in employment income may be beneficial for many customers, some may find themselves disadvantaged by the loss of the transitional rule status, particularly if they later cease or reduce their work hours. Although we welcome the ability for DSP recipients to take up more work, it is important that people receive all necessary information to enable them to make informed decisions about the immediate and long term consequences of such actions.

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<sup>3</sup> The pension rate calculator was amended by the *Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measure) Act 2009*.

<sup>4</sup> The legislation introduced a new income test that reduced the pension by 50 cents in the dollar for every dollar earned over the allowable limit. The transitional rules preserved the old income test for people receiving a pension as at 19 September 2009, which only reduced the pension by 40 cents in the dollar.

<sup>5</sup> For example, most DSP recipients can stop receiving DSP while they undertake employment and return to the DSP if they cease working within 12 weeks. This enables people to try employment opportunities without jeopardising their DSP entitlement.

IP 40: Question 22

Several tools and processes are in place to determine a person's capacity to work and to recommend the content of a person's activity test or participation requirements. In what ways, if any, should these tools and processes be changed to assist mature age participation in the workforce?

IP 40 Question 23

Different activity test and Employment Pathway Plan requirements apply for mature age job seekers. In what ways, if any, should they be changed to assist mature age participation in the workforce?

We identified a few complaints in which people specifically linked their status as a mature age job seeker to the services they received from Centrelink or a Job Services Australia (JSA) provider.

JSAs are private organisations that are contracted by the DEEWR to provide employment services to job seekers. JSAs come within the jurisdiction of the Ombudsman, although in practice, complaints against JSAs are first referred to DEEWR.<sup>6</sup> If that does not resolve the issue, we investigate DEEWR's response to the problem.

Although Employment Pathway Plans (EPPs) do feature in complaints made to this office, the complaints about EPPs tended to be from younger job seekers or those who had not identified themselves as older persons.

Nonetheless, the following complaints highlight the frustration and barriers some mature age workers experience when they try to obtain employment, including a sense that their age means they are not treated with respect. This message echoes the concerns noted by the Australian Human Rights Commission in its recent report, *Working past our 60s: Reforming laws and policies for the older worker*.<sup>7</sup>

**Case study 4: found work for himself**

Mr B was in his 60s and had been unemployed for two years when he complained to this office about the attitude of his JSA provider and the way he was being treated as an older person. Mr B did some research and identified another JSA provider that he thought could provide greater assistance. He contacted the new JSA provider who said they would be happy to work with Mr B. Mr B asked his existing JSA provider to transfer him to the new JSA provider. His request was refused on the ground that it was unreasonable. Mr M complained to DEEWR. DEEWR agreed with the JSA provider's decision. Mr B complained to us. We investigated and formed the view that DEEWR had taken Mr B's complaint seriously. It had referred the matter to a contract manager, which led to Mr B's Employment Pathway Plan being reviewed and new employment consultant assigned to his case. We did point out to DEEWR that it had failed to inform Mr B that he could ask for its decision on the matter to be reviewed. When we contacted Mr B to inform him of the outcome of our investigation, he advised us that he had just commenced a full-time job which he had identified without the assistance of a JSA provider.

<sup>6</sup> JSAs are Commonwealth service providers in accordance with s 3BA of the *Ombudsman Act 1976*.

<sup>7</sup> June 2012, [http://www.humanrights.gov.au/age/publications/Working\\_past\\_60\\_2012.html](http://www.humanrights.gov.au/age/publications/Working_past_60_2012.html)

**Case study 5: problems with a JSA provider**

Mr L informed our office that he is 63 years old and has been unemployed for six years. Mr L said he was meeting his job seeker obligations, but he felt his JSA provider was becoming more demanding in what it required of him. Mr L told us he had lengthy experience as a senior manager but felt that his age was preventing him from getting work. Mr L considered that his JSA provider was rude and failed to show any sympathy for his situation. Mr L had complained to DEEWR about the JSA provider but was unhappy with the length of time it was taking DEEWR to respond. Mr L said he wanted to be treated with 'respect, dignity and professionalism'. Mr L also said he was thinking of cancelling his newstart allowance, and therefore ceasing job search obligations or regular contact with the JSA provider, to try to live off his superannuation until he reached age pension age. This office facilitated contact between Mr L and DEEWR.

**IP 40: Question 25**

In practice, does the 25 hour work, volunteering and study and training limitation for Carer Payment present a barrier to mature age participation in the workforce or other productive work?

A carer payment recipient can work, volunteer and study for up to 25 hours a week without losing their entitlement to that payment. The 25 hours include the time it takes the carer to travel to these activities.<sup>8</sup>

We have received several complaints over the years in which it has been stated that the 25 hour work rule unfairly impinges upon carer providers, particular those in remote or regional locations that have to travel some distance to their work volunteering or study. However, these complaints have not identified that older carers, as opposed to carers in general, are particularly disadvantaged by this rule.

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<sup>8</sup> Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* (2012), [http://www.fahcsia.gov.au/guides\\_acts/ssg/ssguide-3/ssguide-3.6/ssguide-3.6.4/ssguide-3.6.4.40.html](http://www.fahcsia.gov.au/guides_acts/ssg/ssguide-3/ssguide-3.6/ssguide-3.6.4/ssguide-3.6.4.40.html), at 12 June 2012 [3.6.4.40].