

jobwatch
Employment Rights Legal Centre



Grey Areas



Age Barriers to Work in Commonwealth Laws

Submission to the Australian Law Reform Commission Issues Paper

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Introduction

Job Watch Inc (JobWatch) is grateful for the opportunity to provide submissions to this Issues Paper.

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by the federal and Victorian Governments to do the following:

- Provide information and referral to Victorian workers via a free and confidential telephone information service;
- Represent and advise disadvantaged workers, on a pro bono basis;
- Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations; and
- Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

JobWatch believes that all Australians have a fundamental right to access to legal advice and services, regardless of their age, employment status or means. Socioeconomic barriers that prevent individuals from enforcing their rights, have the effect of rendering our justice system meaningless.

At the outset, JobWatch commends the Australian Law Reform Commission (the ALRC) for instigating discussion about Commonwealth legal barriers to older persons participating in the workforce or other productive work.

We note that over the last decade, the issue of Australia's ageing population and its possible economic and social consequences has drawn the attention of policy makers at both state and federal government levels. Significant concerns relate to potential labour and skill shortages, reduced economic growth, pressure on government finances through increased pension and health care costs, and reduced living standards and quality of life for older Australians in retirement, potentially leading to social exclusion.¹

The Australian Bureau of Statistics (ABS) population figures for 2010 showed 13.57 percent of Victorians were aged 65 and over and 1.8 percent were aged 85 plus (corresponding figures for Australia were 13.5 percent and 1.8 percent).²

¹ Department for Victorian Communities 2005, *Victoria: Working futures: Report on Victoria's Participation Taskforce 2005*, Department for Victorian Communities, Melbourne, pp.10 – 12 and Senate Community Affairs Committee 2008, *A decent quality of life: Inquiry into the cost of living pressures on Older Australians*, Commonwealth of Australia, Canberra, p.102.

² Australian Bureau of Statistics 2012, [Year Book Australia 2012](#), Cat No. 1301.0, ABS, Canberra, Table 7.9.

One of the major strategies canvassed to deal with mitigating the consequences of an ageing population is to increase the participation rate of older people in the labour force. Inquiries conducted at state and federal government levels and other studies have identified a variety of barriers to increasing workforce participation. They include pension eligibility, pension level and accrual rate, effective marginal tax rates for extra earnings, access to and level of superannuation, as well as education and skills of older persons, health status, employer and community attitudes, re-entry into the labour force, hiring and training costs, family responsibilities, mismatch between type of jobs and work performance,³ and a culture of early retirement.⁴

JobWatch's submission will be confined to the specific questions (Questions 34 to 46) that the ALRC has raised regarding employment. In doing this, it will examine the problems and issues experienced by older workers in the workplace and identify workplace conditions and practices that act as barriers to the participation of older people in the workforce. This submission will utilise the experiences of older workers who have contacted JobWatch's telephone information service as well as data drawn from JobWatch's client database.

The case studies provided in this submission are actual but de-identified callers to or clients of JobWatch. The verbatim comments of callers/clients are in italics. This submission is also largely based on previous work of JobWatch as compiled in its issues paper, 'Workplace conditions and practices: Barriers to older persons' participation'⁵.

Research Methodology

JobWatch maintains a database record of callers that identifies key characteristics of its callers and trends in workplace relations. The information includes personal and demographic details such as name, address, gender, sex, age, and country of birth. It also includes employment and workplace characteristics such as the industry in which the caller is employed, employment status, occupational group, length of employment, job title, size of company, the industrial instrument the worker is covered by, and problem or issue called about.

In addition, qualitative data including details and description of the enquiry, and information provided to the caller is collected. The qualitative data is based on the information provided by the caller to the JobWatch telephone worker, and what the worker subsequently enters on the database system. Hence, there is considerable variability in the level of detail and scope of the qualitative data collected.

³ The Allen Consulting Group 2005, *Barriers to and options for increased workforce participation in Victoria: A spotlight on specific population groups*, Report to the Department for Victorian Communities and Victoria's Workforce Participation Taskforce, The Allen Consulting Group, Melbourne, p.7.

⁴ S. Encel 2003, *Age Can Work: the Case for Older Australians Staying in the Workforce*, A Report to the Australian Council of Trade Unions and the Business Council of Australia, Social Policy Research Centre, University of NSW, Sydney, p.3.

⁵ JobWatch Inc, September 2009

Quantitative analysis was undertaken of JobWatch data to identify what were the workplace problems or issues that prompted older workers to contact JobWatch's telephone service, and relevant employment and/or demographic characteristics of callers.

A content analysis was undertaken of qualitative data from a selection of JobWatch database records to identify workplace conditions and practices that emerged as barriers to participation. Records were chosen based on the main problems or issues of older callers, and research was carried out that identified issues relevant to participation by older persons, such as carer's responsibilities. The records were selected from 2007 and 2008; where there were a large number of records for an enquiry type they were selected over a shorter time span within that period, and where there were a small number of records for a particular enquiry they were selected over a longer time span.

Furthermore, semi-structured phone interviews were conducted with a selection of older callers who had experienced workplace conditions and practices identified as barriers to participation. The interviews took place between February and May 2009 and ranged from 15 to 45 minutes in length. The purpose of the interviews was to gather detailed information about the workplace difficulties the older callers had experienced, including the impact on them, and obtain their views on barriers to participation.

JobWatch's older callers

Client base

Statistics from JobWatch's database⁶ reveal that an increasing number of older workers and job seekers have contacted JobWatch's telephone service seeking information and assistance about workplace issues over the last twelve years. Older persons constitute 31.1 percent of callers to JobWatch's telephone service and this figure has steadily increased over the last 12 years from 14 percent in 1999/2000 (see Table 1). The increase in the percentage and number of older persons calling JobWatch is consistent with an increase in the proportion of older persons in the labour force.

The overwhelming majority of older people who contacted JobWatch were in some form of employment, only 1.8 percent were job seekers (see Table 2). Females constitute the majority of older callers, except in the 60 plus age cohort where males form the majority as they do in the labour force (see Table 3). The majority of all older callers being female was in line with JobWatch's general caller base; however, it was in contrast to the labour force where males have higher participation rates compared with females.⁷

⁶ JobWatch current database records began in May 1999.

⁷ Please refer to Table 3 for participation rates

Table 1: Older callers by financial year, 1999 to 2011*

Financial Year	Age group		
	45 to 59	60 plus	All older callers
	% of JobWatch callers	% of JobWatch callers	% of JobWatch callers
1999/2000	13.1	1.2	14.3
2000/2001	14.9	1.5	16.5
2001/2002	16.0	1.5	17.5
2002/2003	16.3	2.0	18.3
2003/2004	17.4	2.3	19.7
2004/2005	20.1	2.9	23.0
2005/2006	20.6	3.2	23.7
2006/2007	23.4	3.7	27.1
2007/2008	23.4	3.7	27.1
2008/2009	24.5	4.5	30.0
2009/2010	24.6	4.6	29.2
2010/2011	26.6	4.5	31.1

*Source: JobWatch database

Table 2: Older callers by employment status, 1999 to 2011*

Employment Status	Age group		
	45 – 59	60 +	All older callers
	% of JobWatch callers	% of JobWatch callers	% of JobWatch callers
Apprentice/Trainee	0.5	0.2	0.5
Casual full-time	4.9	4.3	4.8
Casual part-time	8.2	10.1	8.4
Fixed term contract	1.2	1.0	1.2
Fixed Term Contract Extended or Renewed	0.3	0.1	0.2
Independent Contractor	3.2	4.8	3.4
Job seeker	1.8	1.2	1.7
Permanent full-time	61.9	56.4	61.2
Permanent part-time	18.0	21.8	18.5
Total	100.0	100.0	100.0

*Source: JobWatch database

Table 3: Older callers by gender, 1999 to 2011*

Gender	Age group		
	45 – 59	60+	All older callers
	%	%	%
Females	53.9	43.1	52.4
Males	46.1	56.9	47.6
Total	100.0	100.0	100.0

*Source: JobWatch database

Workplace problems of older callers

An analysis of calls from older persons by type of enquiry reveals that the main problems they contacted JobWatch's telephone information service about were: termination;⁸ common law contract matters,⁹ underpayment of wages, workplace violence,¹⁰ Workcover and disability discrimination (see Table 4).

The type of enquiries made by older persons to JobWatch is consistent with JobWatch's caller base, except that Workcover and disability discrimination are greater issues for older callers. Possible explanations for the latter are older persons are more aware of their rights and are more likely to take action, such as lodging a Workcover claim, compared with younger persons; and ageing brings about changes in the physical and mental abilities of older persons.

Table 4: JobWatch age groups 45 years and over and JobWatch caller base by top ten enquiries, 1999 to 2011*

Type of enquiry	45 years +	Type of enquiry	JobWatch caller base
	%		%
Unfair dismissal	12.38	Unfair dismissal	13.46
Redundancy	9.96	Common law contract matters	6.47
Common law contract matters	7.23	Redundancy	6.18
Termination other (excluded from accessing unfair dismissal)	6.05	Workplace violence	5.57
Workplace violence	6.39	Termination other	4.98
Unlawful dismissal	4.22	Underpayment of wages	4.20
Underpayment of wages	4.41	Unlawful dismissal	3.53
WorkCover	4.08	Constructive dismissal	3.67
Constructive dismissal	4.19	Wages – non payment	2.46
Disability discrimination	4.43	Resignation	2.65
Wages – non payment	1.84	WorkCover	2.53
Resignation	2.19	Disability discrimination	2.67
Long Service Leave	3.14	Long Service Leave	1.10

*Source: JobWatch database

⁸ JobWatch's database has a number of categories that capture termination. They include redundancy, unfair dismissal, unlawful dismissal, termination other (excluded from accessing unfair dismissal), constructive dismissal.

⁹ A common law contract matters is an amalgamation of the problem categories of: common law contract change, common law contract breach, common law contract negotiation and common law contract unfair.

¹⁰ Workplace violence is an amalgamation of the problem categories of: harassment physical, harassment sexual, harassment verbal and harassment psychological.

Workplace Conditions and Practices

Introduction

A content analysis of the database records of older callers, as well as information gathered through interviews of older callers, identified key workplace practices and conditions that are barriers to older persons participation in the workforce. They are broadly: discrimination based on age, disability and carer status and loss of entitlements through converting to part-time status or reducing hours.

Discrimination – Age

Marta

Marta – 64 – is a job seeker. She is looking for work as a personal assistant in any industry. She has approached a recruitment agency about possible vacancies but before interviewing her, the agent asks Marta to provide a copy of her birth certificate or licence. Marta is sure that the only reason for this request is that the agent wants to know her age before considering her for a particular job. Marta doesn't think she will get any job.

Frank

Frank - 65 - has been working full-time as a barman. His hours were cut from 38 to 15 hours a week by his employer. The reason Frank was given was that he was “too old to be working”.

JobWatch's older callers were in many instances treated unfairly or unfavourably because of their age. The discriminatory behaviour they experienced ranged from being overlooked for positions or promotions, harassment and bullying, to losing or being forced out of their job (the latter forms of behaviour will be examined in more detail further in this section).

Furthermore, the discrimination encountered by older callers had an impact on their mental and physical wellbeing, finances, family and career. Older callers described loss of self-esteem, depression; difficulty in finding another job, or finding a position but the position was not of the same status and/or pay, reduction of household income and having to re-organise their finances.

Underlying the treatment of older callers were negative attitudes and stereotypes held about older persons. These attitudes were held at all levels of the workplace from those in managerial or supervisory positions to co-workers. The typical attitudes and stereotypes centred on how older persons, particularly those 65 and

over, were too old to be working, should be retired, were past it, not able to adapt to and/or carry out new ideas and/or technology or not interested in more responsibilities. Research from Australia and overseas suggests that negative perceptions and attitudes about older workers outweigh the positive attributes amongst employers.¹¹

Another factor that was crucial was a culture within workplaces which firstly emphasised projecting a young image and, secondly, believed that changes that needed to be implemented in a workplace, whether ideas, technology or procedures were best implemented by younger workers. Very little value was placed on the knowledge, experience and skills of older persons.

Laura

Laura – in her 50s – was employed as a teller on a permanent part-time basis. She had been at the branch for a number of years when a new manager started. The new manager – Lana – was in her early 30s.

She was much younger and had different ideas about how things should work. She targeted older workers who she didn't feel ran with her ideas. Lana made you feel no longer welcome and that you were no longer part of the team. I had an issue with the computer and she asked if I had taken my "Alzheimer tablets".

Laura and other staff received performance reviews by their manager. She received a review from Lana where she believed she was unfairly marked down.

She used the performance reviews as a way to upset staff.

Laura went to human resources and the area manager to appeal the performance review rating and to complain about the ageist comments Lana has made. They found that the manager had been guilty of harassment based on age but the performance review stood. Lana was subsequently sent on a management course.

I had asked for a transfer to another branch but they would not give it to me. They told me I had to go back to work but I could not go back. I ended up being sick and made a Workcover claim.

Laura's WorkCover claim was rejected by the insurance company. The independent psychiatrist report stated that she should not work with that manager again. She is appealing the insurance company's decision.

The effects on her have been wide ranging.

I am on no income (ran out of sick leave, no sickness benefits, no workcover). Luckily I'm in a position where my husband earns reasonable money. I miss working. I never felt like I was getting old until this all started (I don't dress like I'm in my 50s). I was put in a category "old" that I never considered mattered before.

¹¹ M. Bittman, M. Flick, and J. Rice 2001, *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, Sydney, p.40.

Pat

Pat – 65 - works as a fitter and turner and is a long term worker of the company. He has been moved from a computer controlled machine he normally works on to a manual machine (the culture of the workplace is that you are on the same machine). He asked his boss why and was told “you are 65; we don’t like people here at 65”.

Pat was informed verbally and in writing that he would be required to attend a medical assessment if he still wanted to work there. He is fit and healthy, has never had any incident relating to health at work, and is a fast worker. Pat also has cardiology checks bi-yearly. He had a heart attack but that was 9 years ago before he commenced with the firm. In the end, Pat went to the medical assessment and signed a consent form to release medical documents to his employer. The medical assessment found he was fit for work but his employer did not move him back to the computer controlled machine. Pat is now suffering from depression as a result of the situation.

Betty

Betty – 61 - has worked as a regular and systematic casual chef for the past 7 years. She was put in charge of the kitchen one day per week when her boss was away. A co-worker, who converted from casual to permanent full-time, has now been put in charge one day per week. The co-worker is 25 years old while Betty is 61 years old. Betty was not offered the option of becoming permanent although she has worked 35 to 40 hours a week for the past 7 years, the co-worker has only been there 2 years. When Betty raised the issue with her employer he claimed that he offered Betty the permanent position but she claims this was not the case as she would have jumped at the chance. The employer told her that she and the younger woman could both be in charge but this arrangement did not work. Betty feels that she is being “pensioned off”.

Henry

Henry – in the 60 plus age group - had worked as a sales representative for a small wholesale company on a permanent part-time basis for nearly 10 years. He was asked by his employer when he intends to retire. Henry told them when he reached 10 years long service leave. He was promptly told that they would make him redundant if he did not retire by the end of the financial year as he was the oldest member of the sales team.

Workplace Violence (Bullying)¹²

Sophie

Sophie – 65 – works in a clerical role for a small manufacturing company. She has been in that role for about 5 years. Her boss asked her how long she was planning to work for – she said until about 70. Sophie’s boss told her this was too old and they wanted her to stay for a further 6 months only. Her boss (who is also in his 60s) made derogatory comments: “looks like us geriatrics are past our use-by-dates”. Sophie told him she was not a geriatric and did not think she was past her use by date. The employer has subjected Sophie to harassment about her age for a couple of years. They are now proposing to cut her hours in half. Sophie is full of energy and performs her job to the same high standards that she did when she started.

Older callers to JobWatch reported being verbally harassed about when they were going to retire with comments made about how they were “past their use by date” and “too old”. Bullying and harassment also took the form of ignoring or isolating the older caller, making life difficult for them by for example, not giving them time to learn new skills. It was a means used by some employers to try to force older workers out of the workplace.

The perpetrators of bullying were not just those in positions of authority, such as managers and supervisors, but also younger co-workers who viewed the older person as standing in the way of their career paths. In some instances the perpetrators were older persons (either co-workers or managers/supervisors). They viewed the older caller as not submissive enough because they were prepared to speak up, or a threat to their [the perpetrator’s] position because of their experience or knowledge, or saw them as a liability to the workplace because of their age. In other words, they held stereotypes and attitudes about older persons despite belonging to the same demographic group.

It was also evident that in some workplaces, there was a culture where older callers were deliberately excluded and made to feel unwelcome by their younger colleagues. This was particularly the case in workplaces where the older caller was the only, or one of the few, mature age workers.

¹² JobWatch does not differentiate between the concepts of workplace violence and bullying. For data collection purposes workplace violence is defined as comprising any of: physical assault, sexual assault, physical harassment, psychological harassment, verbal harassment or sexual harassment.

Carrie

Carrie – 63 – was employed as a manager of a residential unit within a large community organisation. She had been employed there over 6 years when an worker who she was managing began to bully and harass her.

He would say things like “I need to go home and tell my wife when you are going to retire. You are standing in my career path”.

The bullying and harassment occurred over a period of months and she raised his behaviour with her manager who informed Carrie that they would deal with it. According to Carrie it was swept under the carpet and her complaints were ignored. In the end Carrie resigned from her position.

How I came about to resign was when I returned from leave there was a page of... complaints. I met with the general manager and my immediate manager and the perpetrator, who raised the complaints. He said to the managers that he wanted me to go through the complaints then and there so we went through them. I emailed the manager that night – this guy was calling the shots over the manager. I had 2 days off as I was so upset and my daughter dropped off my resignation letter because I was so traumatized. I then met with the general manager and I asked if I could bring in a mediator and he said it was not the ethical thing to do. I then went ahead with my resignation.

The bullying and loss of her job had a huge impact on Carrie and also her family.

My long term plan was to retire at 65 – I was 63 – and it knocked it on the head. Financially we didn't have any money – I was the bread winner - we had our finances tied up. In the end I had to go on Job Search and look for other work. I did some voluntary work at a community centre and they offered me a job a couple a days a week. I couldn't find full-time work because they would not give me a job that I was less qualified for.

Nicole

Nicole – in her 60s – had worked full-time for 7 years as a credit controller for a wholesale business. A consultant was employed as the financial controller, in effect he was Nicole's manager, and he began to harass and bully her.

He [the manager was the same age as Nicole] asked me “How old are you now?”, “How much longer are you going to work at your age – 1 year, 5 years”. I emailed the general manager to say that he has no right to say that to me - that's discrimination.

Nicole went on leave and when she returned she was told that a new credit controller, Nadia, had been appointed to replace her, and that they were moving Nicole to a different area.

I said you can't employ a 31 year old with no warning. They said she knows MYOB, but I did a MYOB course. He kept putting me down to the point where he talked the general manager into letting the new girl take over and then they decreased my workload.

Nicole went on sick leave and when she returned she went and saw the general manager to ask him what was happening.

They said she is doing this and that, and we need a national credit manager, and you and she [Nadia] can go for it. If you go for it and don't get it then you will have to leave, and if you don't go for it then we will have to make you redundant. They put pressure on me not to take the job (and interviewed other people who weren't good enough) and she [Nadia] ended up getting the job.

Not long afterwards, Nicole suffered an injury at work and is now on Workcover. She said the bullying and harassment had more effect on her than being injured and hospitalised.

The treatment I got from this arsehole [the manager] was worse. He could not handle how I spoke my mind and I had the same knowledge and was the same age as him. He liked younger girls because they said "Yes, Sir" or "No, Sir".

Hana

Hana – 58 – works as a consultant in the fashion industry. She has been bullied and harassed by her colleagues, who are all in their 20s. They ignore her and laugh at her. Hana has found the atmosphere at work unpleasant.

Bruno

Bruno – in the 60 plus age group - has worked as a machinist for a small manufacturing firm for a number of years. He has been put under a lot of pressure to retire. His employer either ignores him or constantly tells him it is time to leave as he is too old. Bruno often feels intimidated and feels like leaving. The harassment has been going on for 6 months.

Judy

Judy – in the 60 plus age group – has been working as a retail assistant for 9½ years on a permanent full-time basis. A new manager started at the store 3 months ago and has been trying to get rid of Judy by making it untenable for her to stay. They have been trying to increase Judy's computer skills but keep shifting the systems so Judy does not have time to get used to them. Judy has been given 2 warnings about her performance and had to sign a paper that if she was not competent they would fire her.

Loss of job through redundancy

Sandy

Sandy – 64 - has worked as a permanent full-time sales team leader/manager for the past 14 years. Recently the business owner told Sandy that they were having a consultant come in to assess the business and recommend changes. Subsequently, the employer told Sandy the position of team leader/manager would no longer exist due to the restructure of the business. However, the employer has now employed a person to become manager and to perform the same role and same duties as Sandy, the new person is in her 30s.

Older callers felt that if they were doing the same job as their younger colleagues, they would be selected for redundancy over them solely on the basis of their age.

Research suggests older workers are often the first target when businesses restructure and downsize.¹³ This is because of perceptions that older workers can access pension entitlements and superannuation, are more prepared for retirement than young workers, they want to retire from the workforce and are a burden rather than an asset to the workplace.¹⁴

In some cases redundancy was used as a means of removing the older caller from their job in order to replace them with younger workers. In other words the redundancy was a “sham”. The employer would change the title of the job, or make modifications to the duties of the position, enabling them to claim that the original job no longer existed, although in reality it was essentially the same job.

Alternatively the older caller was retrenched from his or her job only to find out afterwards that the position still existed and someone else was doing their exact job. In other instances the older caller was not given the opportunity to apply for a new or alternative position created under the restructure, or told that if they applied they would have no chance of getting it (in other words the result was predetermined).

Maria

Maria – 57 – was employed as a part-time bookkeeper for a small business. She had been with the company for 12 years when her employer told her they wanted to outsource the position and Maria should look for something else.

It came as a shock. For about 6 weeks nothing more was said, then he called me in and said that he had found a replacement. They wanted to train her as soon as possible and asked would I train her. I went to the doctor's as I was very upset. I was in shock at the meeting and the next day I sent an email stating my disappointment. I felt angry and betrayed.

¹³ L. Windsor, J. Spoehr, and P. Wright 2005, 'Workforce Development Strategies and Older Workers in Australia', Refereed paper, *Transitions and Risk: New directions in Social Policy Conference*, Centre for Public Policy, University of Melbourne, Melbourne, p.5.

¹⁴ Bittman et al., *Ibid.*, p.12.

Maria went on sick leave for a couple of days and when she returned to work her boss informed her that the new girl was starting the next day. She asked him why she was not given the opportunity to apply for the position but he did not respond. He told her that she should leave the workplace so it would not be uncomfortable. Maria left the workplace and did not return. She subsequently negotiated a severance payment, as she was not legally entitled to one, on the proviso she sign a deed of release. Her severance pay was accompanied by a letter outlining why she was terminated.

In the letter it said the reason for the termination was that the accountant advised him that I was not doing a satisfactory job, that came as a surprise. I thought I was doing a good job. I occasionally made a mistake but I pointed it out and rectified it. These accountants came on board 18 months ago. I told them if they wanted me to do something a different way to let me know. They did not say anything to me. At no stage did they [the employer] say my performance was unsatisfactory, that was the frustration and betrayal, that after 12 years they said I was not doing a satisfactory job.

She was asked about the effects on her of the redundancy.

I felt humiliated and it took me a few days to discuss it with the family. I broke down when I spoke to them. They have never seen their mother so vulnerable. I have made an appointment with a psychologist who I am going to see in a couple of weeks.

Financially we required my pay as we still have a mortgage. If I can't find another job we won't be able to stay where we are (she has found some temporary work from an associate of her employer). In these uncertain times I don't realistically think I will. I might find a part-time job but it might not be enough. It's forced us to look at downsizing now – which we would have done in a couple of years.

Tim

Tim – 68 – has worked as a permanent full-time sales person for around 12 months covering an area between Melbourne and Regional Victoria. He was informed by his employer that his position was being made redundant. Tim said there were three people in sales and they could all interchangeably cover each other's territory. He feels that he was selected for redundancy because of his age as the other 2 salespeople were in their late 30s to early 40s.

Leonie

Leonie – in the 60 plus age group - has worked as a co-ordinator for a small community organization for nearly 13 years. She has been told by the Committee of Management that they no longer need a co-ordinator but a manager and are going to advertise the manager's position. Leonie cannot see how the position would be different to the role she is currently performing.

Graeme

Graeme – in the 60 plus age group - was employed as a permanent full-time Occupational Health and Safety (OH&S) advisor for a large company. His employer mentioned to Graeme that he heard that Graeme was retiring. Graeme told him that was not the case. Subsequently Graeme was told his hours would be reduced from 38 hours to 12 hours a week because the company was re-structuring and his job was going to be reduced. Graeme has found out a new person has been hired to work full-time in his job.

Bruce

Bruce – in the 45 to 59 age group - worked as an operations manager in a small transport company for over 20 years. The company was restructuring and offered several staff redundancies. Bruce has been told he will be replaced in his role by a person with higher IT skills (he was not offered the opportunity to upgrade his). The only job offered to Bruce was as a driver with a salary cut of \$20,000.

Zara

Zara – 54 - has worked as a permanent full-time service operator for over 3 years. She has always had excellent performance reviews. A new manager started at the workplace and he wanted a different and much younger female to work in Zara's job. The new worker is in her early 20s, she does not know the role at all and Zara has to teach her everything. Zara in the meantime has had to return to her original clerical position, which she believes is a demotion, although her rate of pay will not change. In addition the manager, to justify his removal of Zara from the position, made untrue and hurtful comments about Zara's performance with Human Resources. As a result Zara went on sick leave and is being prescribed anti-depressants.

Zara returned to work after a couple of weeks away on leave and on her first day back was called into the office at the end of the day and told she was made redundant, along with two other workers. She asked how her job can be redundant when there is someone else doing her role. Zara was told the new girl had customer service experience (Zara had been working in customer service).

Loss of job through termination

Lou

Lou – 59 - works as a sales clerk in a timber yard and has been employed with the company for 14 years. He was called into the office by his boss and was told that he no longer fits the corporate image and they need a fresher approach. Lou was informed he could either resign or take a lesser job at a site nearby. Lou is a week away from his 60th birthday.

Older callers in some instances were told upfront that their employment was being terminated because they did not fit the corporate image and were being replaced with a younger worker. While in other cases it was more subtle and the employer claimed that their employment was being terminated for poor performance however, they had received no warnings or counselling nor were they given any reason for the termination.

Danielle

Danielle – 60 – worked as a permanent part-time gaming attendant at a sporting club. She had been employed at the club for around 15 years. A new manager who was under 30 years of age was appointed by the club. A couple of weeks after he started, Danielle was dismissed and subsequently two other older workers were dismissed.

When I asked why I was dismissed he said he didn't have to give a reason but I believe he was directed by the Committee of Management (COM). Marian [one of the other workers who was dismissed] and I would stand our ground and fight for what was right. I think that was the reason COM wanted to get rid of us. They wanted people they could manipulate. When we had done our 5 hours we would say we were entitled to meal break. Older workers don't necessarily speak up for themselves – some are terrified of losing their position so will not speak up. It's my own personal outlook to speak up.

They [the employer] wanted a young image – I think a lot of workplaces are like that. It is a perception, a false perception that you have to be young and hip and look good. I think the club tried to go down that track even though most clients are elderly people. The comments that came back to me were that they regretted what they had done.

The loss of her job had an impact on her.

Financially we struggle a little bit as my husband is not working and I am doing a certificate at TAFE in aged care. The only work I did after March [last 15 months] was relief cleaning in a school for 6 weeks.

Lionel

Lionel – 55 - had been employed for over 10 years as the turf manager. He went on long service leave and after he returned to work his employment was terminated.

I wasn't given a reason for the termination – the official reason was that they were moving in another direction. I asked for clarification and they weren't prepared to give it. They employed someone younger and less rigid than I was.

I had a four minute meeting where they asked me to leave in 4 days and there was a real act of secrecy leading up to it. If they valued me as a worker they could have done it a lot better. I adhered to the previous legal requirements of written warnings and notifications to workers so they had a fair opportunity.

His termination had an impact on him psychologically and career wise.

I had to say in the first 3 months I suffered from sleep deprivation and mild depression. Career is finished in that field. I think in the turf industry there is a use by date – exceeding 50 years of age - makes it very difficult to be re-employed.

Lionel subsequently found a job 3 months later teaching horticulture on a part-time basis at a TAFE.

There are some positives and negatives. It [teaching position] is ongoing and I am retraining. From an income point of view there has been a dramatic change – from salary bracket of over \$100,000 I am earning \$13,000 a year. Fortunately my children have left home and my wife works full-time.

Discrimination – Disability¹⁵

Work related injury or illness

Lindy

Lindy – in the 45 to 59 age group – works as a receptionist and has been on Workcover for the last 7 months. She is back at work on full duties except she receives additional support on the busiest day, as provided under her certificate of capacity. Five months after she returned to work she was called into a meeting about her performance and a couple of months later she underwent a performance review. At the review some issues were raised and Lindy had reasonable responses for those issues. Lindy expressed concern about why she was the only one going through a performance review and it was causing her a great deal of stress. She feels she is being scrutinised and treated differently due to her Workcover claim.

Older callers who suffered a work related injury or illness often received negative treatment by employers. In some instances they would be dismissed for lodging a Workcover claim, having time off to receive medical treatment, or being on Workcover. In other cases, older callers experienced greater scrutiny of their performance and suffered other detriment such as demotion or reduction in their terms and conditions.

Furthermore, older callers experienced difficulty in trying to return to work with employers reluctant to make modifications to caller's duties, or claimed that there was no suitable alternative employment available. Even if the older caller was fully fit, the employer was reluctant to take them back to work in some

¹⁵ Under both the Equal Opportunity Act 1995 (Vic) and the Disability Discrimination Act 1992 (Cth), the definition of disability covers both a long term or short term injury or illness. While the Australian Bureau of Statistics definition of disability is a limitation, restriction or impairment which has lasted, or is likely to last, for at least 6 months and restricts everyday activities. This paper uses the definition provided under the state and federal discrimination laws as they are the laws applicable to employment.

instances. Some older callers felt that the combination of their age and a work related injury or illness made them a greater liability in the eyes of their employer.

Luca

Luca had been employed as a warehouse manager for 25 years. He developed a work related hernia and went to his doctor, who gave him Workcover forms. Luca gave the forms to his employer and a couple of weeks later, he was made redundant along with another worker who had made a Workcover claim.

I got very upset, my boss didn't want to talk to me about it.

Luca found work nearly 12 months after he was made redundant (5 or 6 hours a week) through a friend.

He was asked about impact on him personally as well as financially.

For the first 9 months I was disappointed, then I talked to my kids and friends who said what are you worrying about. I changed my attitude and moved on. It has an effect on your life when there are so many years and treated like nothing. They could have found something else for me to do, lot of other work I could have been doing. It has had a big financial effect, my wife is working at the moment, still got to live and bills coming in. Everything she earns goes on food and bills, nothing is being saved like when we have 2 wages coming in.

Hue

Hue – in the 45 to 59 age group - has been working as a warehouse manager for a large transport company for over 3 years. He has been on Workcover for 6 weeks and expects to return to work with only minor restrictions however he may require some more surgery first. Not long after the injury and Workcover claim, the staff that Hue manages were called into a meeting. They were told that Hue was no longer their manager and were introduced to a new manager. Hue was subsequently told his position had changed and on his return to work after the surgery he would be working in a clerical role. He was also told he would no longer have use of a company car, which was part of his contract.

Jim

Jim – 68 – had worked as a cleaner on a full-time basis for nearly 10 years. He had been on Workcover for 7 months. Jim's doctor told him he could return to work on light duties but his employer has told him that there are no light duties however Jim does not believe that is the case.

I don't think they want me back because of my age. Their excuse was going to pay contractors. WorkCover should have made them take me back. The rules say they have to take me back but they [employer]

haven't. The employer never rang me or contacted me to see how I am. I used to do a lot of work and jobs I didn't have to do.

Jim was asked about what could be done to prevent or protect what occurred in his situation.

They should make them take me back. Workcover said to me they asked my employer but my employer refused. After 12 months they [the employer] can take me off the books.

Jim was also asked about the personal impact of what had occurred.

Financially it was a lot because Workcover payments are 75% of wages. I was a bloke who likes to work all the time; I miss working. They sent me to a rehabilitation place re: finding me a job – who is going to give me a job, I'm 69, not with unemployment these days.

Paul

Paul – in the 45 to 59 age group - worked on casual full-time basis as milker on a dairy farm. He lodged a Workcover claim and after 6 weeks off work he was fit to return to work. Paul contacted his employer about returning and his employer told him not to call as he would get back to him. Two weeks have passed since Paul was ready to return to work and he still has not heard anything from his employer.

Non-work related injury or illness

Marisa

Marisa – in the 60 plus age group - is a long standing retail sales worker. She injured her back at home and has been off work for nearly 6 months. Marisa got clearance from both her doctor and physiotherapist to return to work on light duties and for a shorter span of hours per day. The manager of the store said that was not good enough and that she does not want Marisa back in the store until she is 100% fit. Marisa has endeavoured for a couple of months to try and go back to work but has not been successful.

The treatment of older callers who had a non-work related injury or illness was similar to that experienced by older callers who had a work related injury or illness. They experienced difficulty in trying to return to work with employers reluctant to make adjustments to accommodate their illness or injury.

Older callers with an injury or illness who did return to work in some instances encountered bullying and harassment, their performance was placed under greater scrutiny, and they were dismissed from their job. Employers tended to view older callers with an injury or illness as a problem to the workplace instead of still being able to make a contribution. The combination of the factors of illness/injury and age seemed to be viewed by employers as too much of a liability to the workplace.

Anne

Anne – 53 – worked as a waitress on a permanent part-time basis. She went to the doctor for a routine check up and was diagnosed with osteoporosis. Anne took it upon herself to notify her employer of her condition as a matter of courtesy. The day after she informed her employer Anne was dismissed at the end of her shift.

I was told that I wasn't required because they were concerned I would make a Workcover claim about the osteoporosis. The condition wasn't work related and I got on the phone the next morning and said I would sign a stat dec to put their mind at ease. It fell on deaf ears. I was absolutely devastated as I loved my job.

Anne made an unlawful dismissal claim and was awarded compensation however she found it difficult initially to find work as she lived in a rural area. It also had an impact on her financially and psychologically.

I felt like I wasn't making a contribution to society. I adored my job and we [the workplace] received letters and comments complementing me about how I worked. The financial burden, I wasn't earning great amounts of money, but every dollar helps. People talk and make assumptions about your work ability and work ethics. When I went to court it had an effect - don't employ Anne as she's likely to make a claim on you.

A few months after she was terminated Anne heard about a job as a kitchen hand/cook at a café which she applied for and was successful.

I changed my background and branched into a new area. That wasn't easy but now I find I am a pretty good cook. The café trained me themselves and there is ongoing training. The osteoporosis doesn't affect my job. I mentioned it to my new employer and they gave me a full medical and I passed it. It just requires common sense, don't lift heavy objects, and have other ways and means of doing things.

Ken

Ken – in the 45 to 59 age group - had been working for 11 years as a driver in the wholesale industry. He had a heart attack and was absent from work for about a month. When Ken returned to work the employer started making life difficult for him, yelling and screaming at him. He no longer received assistance from colleagues who previously would have helped him out. Ken admits after the operation he has not been coping with the level of stress he previously was able to do. However his employer's behaviour had gotten worse since Ken had his heart attack. Ken was called into a meeting and given a second letter of warning over a trivial issue.

Discrimination – carer status

Glenda

Glenda – in the 60 plus age group - works on a permanent part-time basis as a receptionist in a job share arrangement. Her employer cannot find a good job share partner; they have been through 4 workers. Glenda's employer has now informed her that she needs to go full-time but she is unable to do so because she has caring responsibilities for an elderly mother.

Older callers who had caring responsibilities for a family member in some cases encountered difficulties in having those responsibilities accommodated by their employer. Difficulties included the days and hours they worked changed without consultation and consideration of their caring responsibilities; and the unwillingness of their employer to accommodate job share arrangements or flexible work hours. In some instances older callers believed their caring responsibilities were not given the same consideration by their employer as the caring responsibilities of their younger colleagues who had children.

Older persons carry a significant proportion of caring responsibilities in terms of looking after elderly parents, or an ill partner or disabled child. A survey conducted by the ABS of disability, ageing and carers in 2003 found that 39 percent of all carers were in the 35 to 54 year age bracket and 24 percent of primary carers were aged 65 years and over.¹⁶ The 45 to 54 age group contained the largest number of primary carers in both sexes.¹⁷ Flexible working arrangements are seen as an important option to accommodate older workers caring for family members.

Josie

Josie – in the 45 to 59 age group - works for a government agency and has been employed with them for most of her working life. She has sole caring responsibility for her elderly mother and the shifts she works fits within those responsibilities. She works full-time hours but the spread of hours allows her to care for her mother during the day. Under the collective agreement the employer has the right to rotate staff through different positions, based on the operational requirements of the business. Josie was subsequently rotated into a different position with a different spread of hours (same number of hours) but not suitable for her caring responsibilities.

I wanted part-time shift work and they would not give it to me even though there were heaps of positions available at my level. Over one year I tried every avenue, went through appeals process, went to the regional manager, then to HR and waited and waited and nothing happened. Eventually went through the union and appealed directly to the secretary for a review. Someone objective got involved and I was put immediately on the hours I needed. Prior to that was on full-time and then moved to shift work all over the place that wasn't suitable or feasible.

¹⁶ Australian Bureau of Statistics 2003, *Disability, Ageing and Carers, Australia: Summary of Findings*, (Cat No. 4430.0), ABS, Canberra, p.7-8.

¹⁷ Ibid.

Josie and her mother's health suffered as a result of what happened.

I ended up on anti-depressants and the stress just wore me down. Now that I have to deal with things I haven't got the resilience and reserves of energy. I couldn't get anyone to be objective, when I did it immediately altered. It could have been done 12 months earlier and that would have made a huge difference to my mum and I. Her health and mine deteriorated at that time.

Josie believed that although the certified agreement had provisions for work/life balance and a mature age winding down, the employer interpreted the clauses as they wished. Also older workers who had caring responsibilities were treated differently compared to those workers who had children.

What it boils down to is we can but we won't. The length of time it took and the toll on me when they could have done it in the beginning was a disgrace. In theory you have caring responsibilities but older workers who have caring responsibilities can't to a degree please themselves like those with children.

Loretta

Loretta - in her late 50s – had been working as a personal carer attendant on a permanent part-time basis at a nursing home. Her colleagues, who were younger than her, were always able to take leave during school holidays to spend time with their kids. Loretta, who had grandchildren, also wanted the opportunity to take leave during school holidays. However, the school holidays are not rotated or shared around.

Sophia

Sophia – in the 60 plus age group - has worked for nearly 30 years as a food service attendant in a hospital kitchen. She is employed on a permanent part-time basis. There were changes made to Sophia's shifts without consultation or discussion with her. Sophia lost the same days that she has been doing for almost 30 years. On Sophia's 2 days off she cares for her husband and also attends appointments, which she now cannot attend because of the changes made to her shifts.

Loss of entitlements through reduction in hours

One of the options canvassed to encourage older workers to remain in the workforce is part-time employment or flexible/phased retirement.¹⁸ However, the reduction in hours can leave older workers disadvantaged in terms of entitlements such as long service leave and severance pay. This can act as a disincentive for older workers to reduce their hours and remain in the workforce.

¹⁸ Department of Employment and Industrial Relations, "Experience Pays: What are your options as an older worker?: employee handbook", Brisbane, July 2008, p.10.

Long Service Leave

Miguel

Miguel – in the 45 to 59 age group - has worked as a stacker for a large supermarket company for 11 years and for the last 2 years he has worked on a permanent part-time basis. Miguel was thinking of taking some long service leave and so approached his employer. He was told by his employer that the number of weeks he had due to him was based on the current hours he worked. Miguel believed that the number of weeks would be based on averaged number of hours he had worked over the whole 11 years.

Older callers who converted their employment status from full-time to part-time status, or reduced their hours, experienced a loss of long service leave entitlements. Under the Long Service Leave Act 1992 (Vic), if a permanent worker has reduced their hours in the 12 months before they take their long service leave their leave entitlements will be based on an average of their normal weekly number of hours, going back 12 months or 5 years, whichever is the greater. If the reduction in hours occurred more than 12 months before the taking of the long service leave, the person's long service leave entitlement is based on their current hours. This means the number of hours they worked prior to 12 months will not be factored in calculating their entitlement.¹⁹

A casual worker's long service leave entitlement will be averaged over the preceding 12 months, or five years, whichever is the greater regardless of any changes in hours that occurred more than 12 months before the taking of long service leave.²⁰

Older callers were unlikely to be aware of the implications of reducing their hours until they were due to take or be paid out their long service leave.

Mary

Mary – in the 60 plus age group - had been employed for over 33 years as a medical receptionist at a small clinic. She got a letter from her employer informing her that her hours would be cut from 35 hours to 18 hours a week. Mary had applied for a pension retirement that depends on working a minimum 20 hours over 5 years after retirement age of 62.

¹⁹ Business Victoria 2006, *A Comprehensive Guide to the Victorian Long Service Leave Act 1992*, Department of Industry, Innovation and Regional Development, Melbourne, p.15.

²⁰ Ibid.

Severance pay

Lee

Lee – in the 60 plus age group - worked as field manager in the wholesale industry on a permanent full-time basis for 6 years and then part-time for 2 years. His position was made redundant by his employer. Lee has been told by his employer that his redundancy payment is based on his current ordinary hours of work, 24 hours (he worked part-time) and the 6 years he worked full-time is not factored in the calculation.

Older callers who reduced the hours they worked and were subsequently made redundant were paid out severance pay on the basis of their current ordinary hours of work. The years that they previously worked in that position at a greater number of hours were not factored in the severance pay calculation. Under most awards and certified agreements severance pay is calculated on a worker's current ordinary hours of work.

Discussion and conclusion

An analysis of the problems and issues experienced by JobWatch's older callers reveals that discrimination based on age is a workplace practice that is a barrier to older persons' participation in the workforce. This is despite the efforts of federal and state governments and statutory agencies that administer discrimination laws, and community/employer groups to address the problem of age discrimination through a variety of initiatives over recent years.²¹

However, these initiatives are not broadly known within the wider community and the workplace, where cultural change needs to occur. Research and studies suggest that age discrimination in employment reflects a prejudice against older people in the wider community.²²

Discrimination experienced by older workers is not only based on age but also disability, including work or non-work related injury or illness. Older callers encountered employers who were reluctant to

²¹ Australian Human Rights Commission "Mature workers means business" aimed at employers using a range of print advertisements and web-based material to highlight the benefits of mature age workers and to address discrimination; Victorian Equal Opportunity and Human Rights Commission and Victorian State Government launched an experience at work employers' kit in 2003; the NSW Business Chamber of Commerce on its website is trying to increase awareness amongst businesses of the implications of an ageing workforce and the importance of retaining older workers; the Victorian Employers' Chamber of Commerce and Industry (VECCI) in conjunction with the Department of Victorian Communities produced a guide for small business called "Grey Matters: Recruiting, retraining and retaining older workers"; the Queensland Department of Employment and Industrial relations in July 2008 launched an Experience Pays Awareness Strategy to raise the awareness of the value of mature age workers and the impact of an ageing workforce; the Commonwealth Government announced last year that it would amend the *Age Discrimination Act 2004* to remove the dominant reason test where a person's age must be the dominant reason to constitute discrimination.

²² Mission Australia, Mission Australia 2004, *Unemployment Among Older Workers: Snapshot 2004*, Mission Australia Research and Social Policy, Sydney, p.2.

accommodate their illness or injury despite legislative protections in place under both state and federal laws.²³

In the case of a work related injury or illness, there are provisions to re-employ workers and provide them with suitable duties under the Accident Compensation Act 1985 (Vic).²⁴ While for a non-work related injury or illness there are provisions under state and federal discrimination laws to make reasonable adjustments to accommodate a person with an injury or illness.²⁵ There are also provisions in place under various state and federal legislation that prohibit discrimination based on disability (this covers both work and non-work related injury or illness).²⁶

Disability combined with age seemed to make older callers be seen as a greater liability by an employer. However research suggests that although ageing does bring changes in the physical and mental abilities of older persons, there are variations between individuals.²⁷ Ageing, according to some research, has an upside in that some mental functions actually improve with age (e.g. control of language or the ability to process complex problems).²⁸ While lifestyle related diseases such as cardiovascular disease, diabetes and cancer can affect the work capacity of older workers.²⁹ The literature suggests how age, work and occupational health interact is complex and not well understood.³⁰ Occupational health and safety practitioners suggest that older workers are only a liability if adjustments are not made in the workplace to deal with age related changes or varied physical capacity between workers.³¹

Discrimination based on carer responsibilities was also a barrier with older callers who encountered difficulties having their responsibilities accommodated by their employer. This was despite, in some instances, specific provisions being in place in federal awards or certified agreements that provided for flexible working arrangements and protections in place under federal and state legislation prohibiting discrimination based on parental/carer status.³²

The inflexibility of employers to accommodate or make adjustments for older callers because of their age, disability, or carer's responsibilities underlined the difficulties that older callers experienced.

²³ Equal Opportunity Act 1995 (Vic) , Disability Discrimination Act 1992 (Cth) and Victorian Equal Opportunity and Human Rights Commission 2007, *Disclosing Disability in Employment: Best Practice Guidelines for Employers and the Recruitment Industry*, VEOHRC, Melbourne, p.11. and p.15.

²⁴ Job Watch Inc 2008, *Submission to the Accident Compensation Act Review*, JobWatch, Melbourne, p.5.

²⁵ Equal Opportunity Act 1995 (Vic) and Disability Discrimination Act 1992 (Cth)

²⁶ Accident Compensation Act 1985 (Vic), Occupational Health and Safety (OH&S) Act 2004 (Vic), Equal Opportunity Act 1995 (Vic), Workplace Relations Act (Cth) 1996 and Disability Discrimination Act 1992 (Cth)

²⁷ S. Bielen 2008, Workplace health and safety and the ageing population, Presentation, *Civil Contractors Federation QLD conference building the workforce of our future 08*, Brisbane. p.8.

²⁸ Ibid

²⁹ S. McKenzie, F. Rosenberg 2007, 'Addressing the Health of an Ageing Workforce', Conference paper, *Queensland Mining Industry Health and Safety Conference: Step Change to a Safer Future*, Queensland, p.3.

³⁰ Ibid., p.10.

³¹ Ibid

³² Equal Opportunity Act 1995 (Vic) and Sex Discrimination 1984 (Cth). The Sex Discrimination Act only provides protection in the event a person is terminated and does not cover family responsibilities, only parental/carer status.

Additionally, the manner in which long service leave and severance pay are calculated disadvantaged and are a barrier to older workers who would like flexible working arrangements as part of phasing in retirement or to accommodate their carer responsibilities.

The discrimination encountered by older callers had an extensive impact on them, in terms of their health, finances and the ability to find other work. The re-employment difficulties experienced by JobWatch's older callers are in line with findings from other research and studies.

ABS labour market statistics show that older persons aged 45 years and over are more likely to experience long term unemployment.³³ A study analysing the prospects of older job seekers found that 65 percent of job seekers aged 55-59 had failed to find any employment in a 2 year period and where they found work, it was typically found in casual employment, in jobs that lasted than less than six months, at lower levels of skill.³⁴

A survey into the reasons for retirement of people aged 55-64 conducted as part of a research report undertaken by the Commonwealth Government, Melbourne University and the Melbourne Institute of Applied Economic and Social Research found that 28 percent of respondents surveyed left the labour force due to ill health, disability, stress and carer responsibilities and in 23 per cent of cases it was due to redundancy or dismissal.³⁵ The survey also found that of those respondents who looked for another job, 40 percent found it difficult to re-enter the workforce.³⁶

Studies have also identified that following unemployment, older workers can lose their skills, motivation and confidence and are likely to become discouraged job seekers.³⁷ Statistics from the ABS on discouraged job seekers show that approximately 77 percent were aged 45 years and over (this comprised 20.7 percent in the 45 to 59 age cohort and 56.4 percent in the 60 plus age cohort).³⁸ Discouraged job seekers surveyed by the ABS stated that their main reasons for not looking for work was "considered too old by employers" (49 percent); "no jobs in locality or line of work (18 percent) and "lacked necessary training, skills or experience" (17 percent).³⁹

Older workers have a number of positive attributes which benefit a workplace. Those attributes include skills, experience, loyalty, corporate knowledge, commitment, work ethic, reliability and low absenteeism.⁴⁰

Participation in the workforce is also beneficial for older workers in terms of social inclusion. Research has shown that an exit from the workforce can be detrimental to the physical and mental health and wellbeing of

³³ Australian Bureau of Statistics 2006, *Australian Labour Market Statistics*, Cat No. 6105.0, ABS, Canberra, pp.27-28

³⁴ M. Bittman et al., *op. cit.*, p.8.

³⁵ Senate Community Affairs Committee, *op. cit.*, p.125.

³⁶ *Ibid.*

³⁷ *Ibid.*, p.8- 9.

³⁸ Australian Bureau of Statistics 2009, *Persons Not In the Labour Force: September 2008*, Cat No. 6220.0, ABS, Canberra, pp. 6-7, p.19.

³⁹ *Ibid.*, p.7.

⁴⁰ M. Bittman et al, *op. cit.*, p.39.

older workers.⁴¹ A paper examining self-perceived health status among older Australians found that older workers in paid employment have better health than those who are unemployed or are no longer in the workforce.⁴²

Older persons themselves see working as a means to keep active and mentally alert, maintain social relationships important to their self-esteem and to meet their standard of living.⁴³

Governments at state and federal levels and stakeholders need to work together to address the workplace practices and conditions which act as barriers to the participation of older persons in the workforce. If the barriers remain as they are, in the near future we will see an increasing number of older persons fall between the cracks of paid work and the age pension. This will result in an increasing number of older persons financially and socially excluded from the community.

In this submission, JobWatch will address the questions relating to the area of employment:

Summary of Recommendations

Question 34. In what ways, if any, can the practices of private recruitment agencies be regulated to remove barriers to mature age workers entering or re-entering the workforce?

Recommendation 1: There should be a combination of incentive schemes, codes of conduct and education backed by civil penalty provisions

Question 35. Should s 65 of the Fair Work Act 2009 (Cth) be amended to include age as a basis upon which a worker may request flexible working arrangements?

Recommendation 2: Not only should section 65 be extended to apply to older workers but there should also be some meaningful enforcement mechanisms

Question 36. In practice, do mature age workers negotiate individual flexibility arrangements made under s 202 of the Fair Work Act 2009 (Cth)? Are such arrangements a useful and appropriate flexibility mechanism for mature age workers?

Recommendation 3: There should be some form of enforcement mechanism where an employer unreasonably refuses to negotiate an IFA

⁴¹ L. Windsor et al, op. cit., p3.

⁴² W. Kanjanapan 2002, *Labour Force Patterns and Self-Perceived Health Status Among Older Australians: Implications for Health Ageing*, Commonwealth Department of Health and Ageing, Canberra, p.1.

⁴³ B. Bishop, op. cit., p.35 and M. Hamilton and C.Hamilton 2006, *Baby boomers and Retirement: Dreams, fears and anxieties: Discussion Paper 89*, The Australia Institute, Sydney, p.22.

Question 37. In practice, how effective are the general protections provisions under the Fair Work Act 2009 (Cth) where a mature age worker, or prospective worker, has been discriminated against on the basis of age?

Recommendation 4: Steps should be taken to ameliorate the current deficiencies in the general protections, for example, by requiring employers to make reasonable adjustments to accommodate a worker's disability

Question 38. How does the operation of the modern award system affect mature age workers and in what ways, if any, can modern awards be utilised or amended to account for the needs of mature age workers?

Recommendation 5: There should be some form of enforcement mechanism where an employer unreasonably refuses to negotiate an IFA

Question 39. A number of compulsory retirement ages and licensing or re-qualification requirements exist in particular industries and professions. In what ways, if any, do these create barriers to mature age participation in the workforce or other productive work? If they do create barriers, should they be changed or are they appropriate?

Recommendation 6: Compulsory retirement schemes should be abolished

Question 44. What are some examples of employment management best practice aimed at attracting or retaining mature age workers?

Question 45. What are the most effective ways of raising awareness and providing education and training to remove barriers to mature age participation in the workforce and other productive work?

Recommendation 7: Education, training and other awareness-raising measures should be enhanced

Question 46. What other changes, if any, should be made to the employment law framework to remove barriers to mature age participation in the workforce or other productive work?

Recommendation 8:

8.1 Section 65 of the FW Act could be extended to mirror section 20 of the Equal Opportunity Act 2010 (EO Act), so that it requires employers to make reasonable adjustments for persons with a disability who are offered employment or workers with a disability (which would assist

many older workers with health issues in the workplace). This protection could also be extended to older workers generally, who may require adjustments to be made in order to perform the genuine job requirements or who may just want flexible working practices, for example, working from home

- 8.2 Additionally, the entitlement to redundancy pay under the National Employment Standards (NES) could be amended so that a worker's ordinary hours of work are averaged over their period of continuous service with the employer on termination of employment. This is so that an older worker who has converted from full-time to part-time will not be disadvantaged if their part-time role is made redundant. It will also encourage older workers to stay in employment
- 8.3 JobWatch submits that the Victorian Government should consider extending comparable obligations under the Act to employers of older workers. Such obligations would enable older workers to take time off work for the purposes of necessary health checks or to request flexible working arrangements in the years approaching retirement
- 8.4 To protect the entitlements of older workers, section 64 could be amended to include workers who reduce their hours within the five years immediately prior to retirement. In these circumstances, their entitlements could be based on their average working hours over the last 10 years of their working lives
- 8.5 Occupational Health and Safety bodies should develop an older workers' occupational health and safety kit for both older workers and employers. The kit would address misconceptions about older persons, ageing and occupational health and safety risks. It could also deal with issues such as work task and job design, work organization and work environment

Question 34. In what ways, if any, can the practices of private recruitment agencies be regulated to remove barriers to mature age workers entering or re entering the workforce?

Existing federal and state anti-discrimination laws prohibit discrimination on the basis of age in certain situations – including recruitment and offers of employment, and against certain classes of people – workers, commission agents and contract workers. However, although it is unlawful for recruitment agencies to discriminate against older workers both through their own practices or by following discriminatory employer requests, many employers and recruitment agencies do not know or understand their legal obligations.

One of the main problems with anti-discrimination law is that it is an individual complaints driven system. Therefore, a federal government agency should be empowered to prosecute breaches of anti-discrimination legislation and to seek civil penalties.

JobWatch believes that the practices of private recruitment agencies could be further regulated by the implementation of codes of conduct, guidelines or minimum standards which could provide guidance about constructively engaging with and finding older workers employment.

For example, a reporting framework similar to that administered by the Equal Opportunity for Women in the Workplace Agency, which would require employers and recruitment agencies to report against equality indicators related to age, or a code of ethics and professional conduct to establish the professional and ethical conduct expected by the private recruitment industry, such as that for members of the Australian Human Resources Institute.

Alternatively, another regulatory approach would be to require the recruitment industry to comply with licensing requirements under a federal licensing regime, such is the case in other industries which provide services to the public. One such requirement could be for workers (including those in managerial and supervisory positions) and directors of private recruitment agencies to undertake regular training and education on their statutory obligations regarding age discrimination, which should include addressing stereotypes of older workers and providing education regarding the benefits older workers bring to the workplace. The federal government (via the Department of Education, Employment and Workplace Relations (DEEWR) or the Fair Work Ombudsman (FWO)) could conduct random audits to monitor compliance.

Additionally, to promote the employment of older workers, recruitment agencies could be given formal public recognition. Such recognition could be modelled on the annual awards and 'employer of choice' lists compiled by the federal government's Equal Opportunity for Women in the Workplace Agency, or the DEEWR's incentive scheme for 'Corporate Champions' (consisting of a package of tailored support), for employers who make a public commitment to move toward better practice in employing mature age people. The federal government could also give an incentive payment to recruitment agencies who find employment for older workers (a similar scheme for employers has recently been implemented by the federal government from 1 July 2012⁴⁴), additionally with a new payment being given for each year the older workers remains in that employment.

Recommendation 1: There should be a combination of incentive schemes, codes of conduct and education backed by civil penalty provisions.

⁴⁴ Under this scheme administered by the Department of Education, Employment and Workplace Relations, a 'jobs bonus' of \$1000 will be available to employers who recruit an eligible mature age job seeker, aged 50 years or over.

Question 35. Should s 65 of the Fair Work Act 2009 (Cth) be amended to include age as a basis upon which a worker may request flexible working arrangements?

Under section 65 of the Fair Work Act 2009 (FW Act), only workers (with the requisite 12 months service) who are the parent of or have responsibility for the care of a child under school age (or under 18 with a disability) may request a change to their working arrangements.

JobWatch believes that this right should be extended to put comparable obligations on employers of older workers, and also workers with caring responsibilities generally. This would enable older workers to request flexible working arrangements in the years leading up to retirement, if they do not want to stop working but need to make some changes to their working arrangements, such as reducing their working hours or converting to part time or casual employment or changing their place of work.

There is also a significant problem with this National Employment Standard (NES) being that there are none or very limited enforcement mechanisms available. As it stands, section 65 merely provides a right to request flexible work arrangements and to receive a written response. Currently, the FWO does not formally investigate an alleged contravention of section 65 of the FW Act, a possible exception being where an employer has not provided a written response within 21 days. However, the reality is that even if a contravention letter or compliance notice is issued, the FWO is not able to escalate the matter further where an employer does not respond or take steps to comply with the FW Act, except possibly to seek a civil penalty (i.e. a fine) for failure to provide written reasons.

Further, the worker's right to request flexible working arrangements under section 65 of the FW Act is not a civil remedy provision under Part 4(1), meaning that it is not enforceable. This essentially means that the alleged right has no legal effect because an individual or the FWO is not able to commence proceedings in relation to a contravention or to seek a civil penalty against the employer.

Therefore, not only should section 65 be extended to apply to older workers but there should also be some meaningful enforcement mechanisms and not merely a right to request flexible working arrangements.

Recommendation 2: Not only should section 65 be extended to apply to older workers but there should also be some meaningful enforcement mechanisms

Question 36. In practice, do mature age workers negotiate individual flexibility arrangements made under s 202 of the Fair Work Act 2009 (Cth)? Are such arrangements a useful and appropriate flexibility mechanism for mature age workers?

JobWatch supports the concept of individual flexibility arrangements (IFAs), as they provide a mechanism for greater flexibility by allowing employers and individual workers to make arrangements which vary the effect of the modern award or enterprise agreement, to meet both of their needs, so long as the worker is

better off overall. However, JobWatch is not able to comment on this question as it is not aware of any older workers who have negotiated (or attempted to negotiate) IFAs under an enterprise agreement or modern award.

Nevertheless, JobWatch cannot envisage any circumstances where it would be beneficial for older workers to use an IFA, which wasn't already covered by the protections that exist under anti discrimination laws concerning disability and family/carers responsibility discrimination (for example, reasonable adjustments and requests for flexible work arrangements).

Additionally, some vulnerable, older workers may not be able to or be in a position to negotiate an IFA, or may be hesitant to attempt to do so for fear of negative consequences. Regardless, if an employer refuses to negotiate an IFA with an older worker, there is no further action the older worker can take under the FW Act.

Recommendation 3: There should be some form of enforcement mechanism where an employer unreasonably refuses to negotiate an IFA

Question 37. In practice, how effective are the general protections provisions under the Fair Work Act 2009 (Cth) where a mature age worker, or prospective worker, has been discriminated against on the basis of age?

JobWatch is not aware of any Federal Court or Federal Magistrates Court decisions under the general protections provisions regarding age discrimination. This is in contrast to the significant number of Tribunal and Federal Court decisions regarding age discrimination under the state and federal anti-discrimination laws⁴⁵.

However JobWatch believes that the general protections provisions are generally effective in protecting workers from age discrimination.

The provisions are effective for the following reasons:

1. under the FW Act, there is a reverse onus of proof in that it is presumed that the action was taken for the alleged prohibited reason unless the Respondent proves otherwise;⁴⁶
2. the unlawful or discriminatory reason only needs to be part of the reason for the adverse action, that is for the purposes of the provisions, a person takes adverse action for a particular reason if the reasons for the action *include* that reason;⁴⁷
3. the FWO has enforcement powers in that it is able to take on discrimination matters under the general protections provisions; and

⁴⁵ For example between 2007 and 2011, there were at least 5 age discrimination matters heard under the Age Discrimination Act 2004 (Cwth) and between 2002 and 2010, there were at least 7 age discrimination matters heard under the Victorian Equal Opportunity Act 1996 (now the Victorian Equal Opportunity Act 2010).

⁴⁶ Section 361, Fair Work Act 2009 (Cwth)

⁴⁷ Section 360, Fair Work Act 2009 (Cwth)

4. the cost implications of using the jurisdiction, in that each party bears their own costs in relation to a matter under the general protections provisions (except in certain circumstances) as opposed to, for example, the regime under federal anti discrimination legislation where costs generally follow the event.

The provisions are not effective for the following reasons:

1. they do not make it clear that it is unlawful to discriminate both directly and indirectly as they do not make a distinction between the two forms of discrimination as opposed to state and federal anti-discrimination laws;
2. exceptions apply as under state and federal anti discrimination laws as the protection from discrimination does not apply to action that is not unlawful under any anti-discrimination law;⁴⁸
3. there is an inherent requirements defence for employers, that is, it is not unlawful to take adverse action against a worker where the action was taken because of the inherent requirements of the particular position,⁴⁹ but there is no requirement for the employer to first make reasonable adjustments to accommodate a worker's disability;
4. the procedure for a general protections application is that if settlement is not reached at the conference, the Applicant must file an application in the Federal/Federal Magistrates Court. This can be impracticable and unworkable for workers, particularly where they have a disadvantage and/or who cannot afford legal advice or representation;
5. it is common for unscrupulous employers to refuse to attend a conference as a litigation strategy. Currently where a worker who is still employed files a general protections application, Fair Work Australia (FWA) has no power to make employers attend conferences or to penalise employers if they do not attend. Therefore employers should be required to attend conferences where "non termination" applications have been filed. FWA should be empowered to make an enforceable order against a respondent for refusing to attend a scheduled conference; and
6. currently under the FW Act, it is unclear whether workers of independent contractors are protected from adverse action resulting from a contravention of the general protection provisions. Section 342 currently provides unclear direction regarding remedies available to workers of independent contractors. Therefore workers hired by independent contractors and who work for a principal/host are not adequately protected. Therefore section 342 should be amended to include provisions to protect workers of contractors from unlawful adverse action by principals.

Recommendation 4: Steps should be taken to ameliorate the current deficiencies in the general protections, for example, by requiring employers to make reasonable adjustments to accommodate a worker's disability

⁴⁸ Section 351(2)(a), Fair Work Act 2009 (Cwth)

⁴⁹ Section 351(2)(b), Fair Work Act 2009 (Cwth)

Question 38. How does the operation of the modern award system affect mature age workers and in what ways, if any, can modern awards be utilised or amended to account for the needs of mature age workers?

JobWatch notes that modern awards must include a 'flexibility term', enabling a worker and the employer to make an IFA to vary the effect of the enterprise agreement to accommodate the worker's circumstances. Therefore older workers who are covered by modern awards may negotiate IFAs with their employers, for example, to vary their work arrangements.

However as stated above, JobWatch is not able to comment as to whether older workers utilise IFAs under modern awards to accommodate their needs as it is not aware of any older workers who have negotiated (or attempted to negotiate) IFAs under a Modern Award.

Jobwatch repeats its comments and recommendation made under question 36 regarding the usefulness and practicability of IFAs for older workers.

Recommendation 5: There should be some form of enforcement mechanism where an employer unreasonably refuses to negotiate an IFA

Question 39. A number of compulsory retirement ages and licensing or re-qualification requirements exist in particular industries and professions. In what ways, if any, do these create barriers to mature age participation in the workforce or other productive work? If they do create barriers, should they be changed or are they appropriate?

JobWatch considers that compulsory retirement schemes are inappropriate as they can create barriers to the participation of older workers in the workforce due to the fact that they are inherently discriminatory and do not take account of individual circumstances. They can also create a negative stereotype of older workers being incompetent or incapable of undertaking paid employment.

As a result, JobWatch believes that such schemes should be abolished so that it is the individual worker's choice as to whether and when they retire, so long as they can still undertake the genuine and inherent job requirements after the making of any necessary adjustments.

JobWatch believes that adequate safeguards exist within licensing or re-qualification requirements, as well as standard testing to discern whether workers are able to perform the inherent requirements of their jobs, so that any potential occupational health and safety or performance issues will be identified and addressed at an early stage. However, JobWatch is of the view that re-qualification requirements and assessments should only relate to a worker's ability to perform the tasks of their particular job, regardless of their age.

Recommendation 6: Compulsory retirement schemes should be abolished

Question 44. What are some examples of employment management best practice aimed at attracting or retaining mature age workers?

JobWatch believes that employers can attract and retain older workers by providing flexible workplaces including, for example by:

- a) providing opportunities for part time employment;
- b) implementing job sharing;
- c) accommodating flexible work hours (for example, variable start and finish times);
- d) permitting older workers to work from home; and
- e) providing flexible leave options.

JobWatch also believes that employers can attract and retain older workers by implementing successful recruitment and management strategies including, for example, by:

- a) employing age-friendly job selection processes and staff;
- b) carrying out an induction process for older workers when they begin work;
- c) encouraging older workers to maintain and develop their skills, knowledge, qualifications and training ;
- d) valuing older workers and showing that you appreciate their skills and experience;
- e) ensuring occupation health and safety, providing suitable equipment;
- f) allowing mature age workers to return to work after retirement;
- g) providing alternative, interesting and exciting job opportunities;
- h) designing age-friendly job advertisements and making these accessible to older people; and
- i) considering the physical and mental needs of older workers.

Question 45. What are the most effective ways of raising awareness and providing education and training to remove barriers to mature age participation in the workforce and other productive work?

JobWatch believes that education, training and awareness-raising measures are important mechanisms that enhance the community's knowledge and understanding of workers' rights and employer's obligations under the law

JobWatch submits that the following measures should be adopted to raise awareness and provide education and training to remove barriers to older workers' participation in the workforce:

- a) the federal and state governments across Australia should launch a joint media campaign promoting the benefits of older workers and obligations of employers and workers under discrimination laws; and to inform older workers about the rights and recourses they have open to them under legislation;
- b) the FWO and the state and federal equal opportunity agencies should increase their educative role to assist employers, recruitment agencies and workers to understand their rights and obligations under federal and state anti-discrimination laws, specifically regarding age discrimination. These agencies and community legal centres should be adequately funded to provide free, on-going community education and training programs;
- c) there should be a requirement for all directors and workers of employers and recruitment agencies to attend ongoing education and training programs, specifically targeting age discrimination (as discussed under question 34);
- d) educative material should continue to be developed and published to raise awareness of different types of age discrimination amongst older workers and job seekers. For example, the Australian Chamber of Commerce and Industry's publication and campaign, *Employ Outside the Box*, the educative material released by FWO aimed at assisting older workers to avoid age discrimination at work, and the Victorian Equal Opportunity and Human Rights Commission's recent publication, *'Mature-age workers and the Equal Opportunity Act – know your rights'*.

Recommendation 7: Education, training and other awareness-raising measures should be enhanced

Question 46. What other changes, if any, should be made to the employment law framework to remove barriers to mature age participation in the workforce or other productive work?

JobWatch believes that the following changes should be made to the employment law framework to remove barriers to older workers' participation in the workforce or other productive work:

Recommendation 8:

Fair Work Act 2009 (Cwth):

- 8.1 Section 65 of the FW Act should be extended to mirror section 20 of the EO Act, so that it requires employers to make reasonable adjustments for persons with a disability who are offered employment or workers with a disability (which would assist many older workers with health issues in the workplace). This protection could also be extended to older workers generally, who may require adjustments to be made in order to perform the genuine job requirements or who may just want flexible working practices, for example, working from home.**

8.2 Additionally, the entitlement to redundancy pay under the NES could be amended so that a worker's ordinary hours of work are averaged over their period of continuous service with the employer on termination of employment. This is so that an older worker who has converted from full-time to part-time will not be disadvantaged if their part-time role is made redundant. It will also encourage older workers to stay in employment.

Equal Opportunity Act 2010 (Victoria):

Sections 17 and 19 of the EO Act require employers to "accommodate" the parental or carer needs of their workers (including people to whom employment has been offered). Similarly, section 20 of the EO Act requires employers to make "reasonable adjustments" for workers (including people to whom employment has been offered) with a disability.

8.3 JobWatch submits that the Victorian Government should consider extending comparable obligations under the Act to employers of older workers. Such obligations would enable older workers to take time off work for the purposes of necessary health checks or to request flexible working arrangements in the years approaching retirement.

Long Service Leave Act 1992 (Vic):

Older workers are often encouraged to reduce their working hours rather than give up working altogether. This can mean that older workers lose significant entitlements such as long service leave and severance pay. To address this, the *Long Service Leave Act 1992* (and the other State Acts regulating long service leave) could be amended, to preserve the entitlements of older workers who shift from full time to part time work in the years immediately prior to retirement.

At present, section 64 of the Act provides that if workers reduce their hours in the 12 months before taking (or being paid out) their long service leave entitlements, then their entitlements will be based on their average hours worked over the preceding five year period. This fails to protect workers who significantly reduce their hours more than 12 months before they retire.

8.4 To protect the entitlements of older workers, section 64 could be amended to include workers who reduce their hours within the five years immediately prior to retirement. In these circumstances, their entitlements could be based on their average working hours over the last 10 years of their working lives.⁵⁰

⁵⁰ This recommendation was made by JobWatch in the Federation of Community Legal Centre's submissions regarding the Inquiry into the Opportunities for Participation of Victorian Seniors (p.9)

Occupational Health and Safety:

8.5 Occupational Health and Safety bodies should develop an older workers' occupational health and safety kit for both older workers and employers. The kit would address misconceptions about older persons, ageing and occupational health and safety risks. It could also deal with issues such as work task and job design, work organization and work environment.⁵¹

Please contact Ian Scott of JobWatch's Legal Practice on (03) 9662 9458 if you have any queries about this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Z. Bytheway', with a large, stylized flourish at the end.

Per:

Job Watch Inc

Authorised by Zana Bytheway, Executive Director

⁵¹ S. Bielen 2008, Workplace health and safety and the ageing population, Presentation, *Civil Contractors Federation QLD conference building the workforce of our future 08*, Brisbane. p.21-7