

The Elephant in the Room

Age Discrimination in Employment

April 2011





Australian Government
Department of Health and Ageing

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FOREWORD

There is no doubt that older workers make a massive contribution to Australia's economy. An earlier report released by the National Seniors Productive Ageing Centre, *Still Putting In*, showed that older workers contributed \$59.6 billion a year to our economy. Equally, the country loses an astounding \$10.8 billion a year by not making use of the skills and experience of older Australians who want to work¹. Which prompts the question – why are we overlooking these older workers?

This report explores that question, and the results are not pretty. It finds that age discrimination is widespread - in recruitment, in promotion, and during times of retrenchment. It is evident in workplace harassment and pressure to retire, and in the unspoken but powerful assumption that the best workers are young workers.

Age discrimination, although widespread, is “the elephant in the room” – palpable but unmentionable. Australia loses incalculable talent and energy through age discrimination. Paradoxically, while the federal government is encouraging people to stay in the workforce well past the once-mandatory retirement ages of 60 or 65, many older workers find themselves rejected. There is a painful gap between laws against age discrimination, and the practice of age discrimination.

The thrust of this report is that awareness of age discrimination law leads often to nimble side-stepping – compliance with the letter rather than the spirit of the law. Recruitment advertisements no longer mention age but resort to euphemisms. Where complaints of age discrimination have been made, in many cases complainants received only an apology. Very few people refused a job were subsequently offered that job, and compensatory payments were usually low.

The effect of discrimination on older workers is often devastating. The case studies and personal accounts reveal the harrowing experience of older workers who have felt the weight of age discrimination and rejection. The policy implications emphasise that age discrimination cannot be ignored, even if it has become less overt, and more efforts are needed to overcome it.

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April 2011

¹ National Seniors Productive Ageing Centre (2009). *Still Putting In: Measuring the economic and social contributions of older Australians*. Canberra.

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The study upon which this report is based was undertaken by Emeritus Professor Sol Encel, Honorary Research Associate of the Social Policy Research Centre at the University of New South Wales, with contributions from Penelope Nelson and Maria Stafford*. In part, this report is an update of an earlier study, *Over the Hill or Flying High?* (Encel and Studencki, 1998).

The authors of the original study and the National Seniors Productive Ageing Centre gratefully acknowledge the support provided to this project by the Australian Human Rights Commission.

Sadly, Sol Encel died in 2010, not long after delivering his report to the National Seniors Productive Ageing Centre. The publication of this concise version of his study honours his memory, and his outstanding contribution to important social research over many decades.

*The original study is available in full at www.productiveageing.com.au

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INTRODUCTION

Once again, the drums are beating out a familiar yet frustrating message. Rarely a week goes by without a headline warning of skills shortages that could derail the nation's economic growth. Often the warnings come with pleas for more migration to solve the problem. Usually they are linked to Australia's ageing population, an indisputable demographic fact.

Yet, just below this dominant sound track, there is a quieter, more haunting refrain. It tells of wasted talent and missed opportunities. It suggests we should be looking closer to home if we really want a skilled and committed workforce. In short, we should make much better use of the skills and experience of older Australians.

This report examines age discrimination from the point of view of the people who have experienced it, so it is a qualitative rather than a quantitative approach.

This study draws upon three different sources of information:

- Literature review, focused mainly on cases dealt with by courts and tribunals.
- Complaints to statutory bodies, the New South Wales Anti-Discrimination Board (ADB) and the Australian Human Rights Commission (AHRC).
- Contributed personal accounts, received from individuals in response to requests for personal stories.

This study includes summarised examples of age discrimination complaints lodged with the Australian Human Rights Commission and the NSW Anti-Discrimination Board. It also contains first-hand accounts of unfavourable treatment in the workforce from informants who did not make formal complaints.

Table 1 indicates the numbers of cases received from different sources of information, and the range of issues involved. There is a striking difference between them. Complaints to the two statutory bodies are overwhelmingly concerned with difficulties encountered in the workplace itself.

On the other hand, almost one half of contributed accounts were concerned with lack of success in applying for jobs. Since discrimination is very difficult to prove in the absence of overt acts, it may be assumed that the people concerned did not pursue the matter, but it is clear that they have been deeply affected by the shock of rejection.

Table 1 Results from the Data Sources

(a) New South Wales Anti-Discrimination Board 1998 (n=22)	
Overlooked in favour of younger people	8
Pressed to retire	7
Unfair treatment at redundancy	2
Perceived discrimination when applying for job	2
Other	3
(b) New South Wales Anti-Discrimination Board 2009 (n=10)	
Stigmatisation	2
Unfair treatment at redundancy	1
Harassment	2
Victimisation	1
Coerced reduction of hours worked	2
Social exclusion	1
Bullying	1
(c) Australian Human Rights Commission 2009 (n=14)	
Perceived discrimination when applying for job	3
Unfair treatment at redundancy	5
Discrimination and harassment at workplace	6
(d) Contributed Personal Accounts 2009 (n=50)	
Perceived discrimination when applying for job	24
Unfair treatment at redundancy/retrenchment	8
Gendered ageism	4
Stigmatisation	3
Victim of restructuring	2
Pressed to retire	2
Other (bullying, victimisation, denial of promotion, denial of training opportunities, discouragement by superiors, misled by government schemes, difficulties with younger staff)	1 each

Different sources, different results

The literature review suggests that law and practice here and overseas are increasingly concerned with discrimination (see for example Taylor and Walker, 1994; OECD, 1998; AARP, 2000; Age Concern, 2004 and Taylor, 2009). In Australia, there has been a move away from narrow judicial interpretation of discrimination, and some complaints have secured favourable outcomes (Encel and Ranzijn, 2007). However, there is room for improvement in this area, with some cases showing that upholding the letter of the law does not always prevent, or compensate for, discrimination in practice.

The information from the ADB and AHRC shows that the everyday experience of workplace discrimination remains difficult to prove and, even when proven, gives little satisfaction to the claimant.

The individual accounts reflect the shock and feelings of betrayal which are the result of unexpected loss of employment, coupled with the painful realisation that age is the effective reason for lack of success. This is an area where formal remedies have so far been of little use, and any improvement will require much more effort from government and from voluntary organisations.

In an earlier study by Encel and Studencki (1998), access was permitted to the files of the ADB. With the co-operation of Board staff, the researchers were able to inspect the records of cases that had been dealt with under the provisions of the NSW Anti-Discrimination Act and were no longer active. Twenty-two cases became available, on condition of anonymity.

Documented cases give only limited insight into the problem of discrimination, since most complaints are not proceeded with. The records of the ADB for the four-year period covered by this earlier research indicated that only ten per cent of complaints were pursued to obtain a conciliated

outcome or a tribunal hearing. More recent statistics, from research in 2009, suggest that the situation has not changed much.

ADB cases were again examined on a similar basis in 2009, with results described in the relevant section of this report. Unfortunately, access to ADB records was much more difficult to obtain, partly because of legal changes since the 1990s. In the end, records of only ten completed and de-identified cases were obtained. Examples of these cases are given in a separate section of this report. Because of the small number of cases able to be obtained from the ADB, the results of the earlier study also based on ADB files have been included.

The researchers obtained access to conciliated cases dealt with by the AHRC, a Commonwealth body that was given the power to deal with complaints under the Age Discrimination Act of 2004. Some of these cases are described in this report.

The researchers sought information and contacts from occupational associations, including professional bodies, trade unions and women's groups. This approach led to only a very small number of contacts. Social networking sites, media comment sites and blogs provided a volume of uncensored comment on the experiences of a wide range of individuals¹. Interviews were conducted with people who contacted the researchers by mail, telephone or email. Altogether, 37 interviews were conducted, mainly by phone. Twenty-five were women, compared with twelve men.

1. For a list of sites used, see original report at www.productiveageing.com.au

The comparative significance of the various sources, analysed by age group and gender, is shown in Tables 2 and 3.

The tables show that the peak period when a person is likely to complain about age discrimination is in their early 50s. From the personal accounts, it appears that most of them have decided not to claim discrimination, but to tell their painful story to a sympathetic listener.

Table 2 Analysis by age groups

Age	Contributed personal accounts	AHRC	ADB 1998	ADB 2009
35-44	1	1	2	2
45-54	17	2	11	4
55-64	25	8	8	3
65 Plus	7	3	1	1
Total	50	14	22	10

Table 3 Analysis by gender

	Contributed personal accounts	AHRC	ADB 1998	ADB 2009
Male	35	8	10	6
Female	15	6	12	4
Total	50	14	22	10

WHY AGE DISCRIMINATION MATTERS

A prosperous, cohesive society cannot afford to overlook the ability of all age groups to make a contribution. Eliminating age discrimination in the workforce remains a challenge for governments, legislators, human resource specialists, employers and individuals.

Australians pride themselves on a sense of fairness, which implies that a good work record will be rewarded by equitable treatment on the part of employers. The unrivalled economic prosperity of the half-century following the end of World War Two also generated a sense of security. For many of our respondents, accustomed to a buoyant labour market, it has been difficult and painful to acknowledge that age is the effective reason for retrenchment and subsequent prolonged unemployment.

A 2006 survey into work discrimination in 28 countries by the American consulting firm Kelly Services Inc. found that age discrimination was on the rise, and taking newer and subtler forms. This rising age discrimination was happening paradoxically at a time when the skills and experience of older workers were increasingly in demand. "Organisations that don't address discrimination in the workplace can suffer a range of costs. Many economies are facing skill shortages associated with labour conditions and ageing populations, which places greater importance on sourcing recruits from the widest possible pool of talent"².

Similar findings have been reported in Australia. As far back as 1994, a survey of the unemployed by the Australian Bureau of Statistics (ABS) found that 44% of respondents aged 45 and over identified age as the most important single obstacle to re-employment, a figure which jumped to 64% among

respondents aged 55 and over (ABS, 1994). A more recent survey of “discouraged job seekers” by the ABS found that the most important reason reported for not actively looking for work (36% of the sample) was “considered too old by employers” (ABS, 2009). Among the characteristics of discouraged job seekers, the most salient was age: 52% of the sample were 55 and over.

Age, employability and social exclusion

Social inclusion means ensuring no Australian is left behind, by giving everyone the opportunities and resources to learn, work, connect with others and have a say in community life. Despite a strong economy, disadvantage still stops many people from getting a fair go, and costs the nation in lower productivity, chronic health problems, welfare dependence and fractured communities.

An inclusive society embraces the talents and contributions of all citizens, regardless of their age, gender or ethnic background. By contrast, social exclusion brings disadvantage such as poverty, unemployment, ill-health, physical and mental disability, and isolation, which become more acute with age. Age discrimination at work denies full participation to an important section of the community and leads to intergenerational tensions.

Age itself is on the way to becoming an aspect of social exclusion, especially when it is linked with employment and employability. Many of the people who contributed their experiences to this report clearly felt excluded because of their lack of success in the labour market.

The vocabulary of exclusion

The reality of exclusion is often masked by a vocabulary of euphemisms and circumlocutions. From the contributed personal accounts, such negative comments included:

- We didn't think you were right for the job.
- We didn't think you'd fit in.
- Overqualified (a code term for length of experience, which equates to age).
- Underqualified (too old to have obtained the current certificate or diploma qualification although experience may be of equal or superior quality).
- Why don't you go on the pension?
- Qualifications and experience not up to date.
- Would you be able/happy to work with a young team?
- We want someone with a high energy level.
- We doubt whether you could learn the required new skills in the available time.
- Standing in the way of younger people.

ABS figures from a 2007 survey of 3.9 million workers aged 45 and over show that 85% intend to retire from the workforce eventually, while the remainder do not intend to retire (ABS, 2008). For those who intend to retire:

- 24% intend to retire aged 70 years or over (30% of men and 17% of women)
- 40% intend to retire aged 65 to 69 years (45% of men and 34% of women)
- 24% intend to retire aged 60 to 64 years (18% of men and 31% of women)

These aspirations suggest that middle-aged Australians want an active lifestyle in their sixties, and take for granted the option of remaining in the workforce. Eliminating age discrimination is an important step in helping older people to keep working.

BACKGROUND - AGE DISCRIMINATION IS NOT NEW

The existence of active discrimination against older workers has attracted attention for many years. Despite many studies stressing the positive qualities of older workers, the dice remain loaded against them. As far back as the 1950s, a longitudinal study based at Cambridge University noted that resistance to the employment of older workers was based on stereotypes which were demonstrably false (Welford, 1958).

With the end of the post-war economic boom, reducing labour costs through “downsizing” has hit older workers particularly hard. American economist Lester Thurow noted that many downsized older workers would lose more than 50% of their previous wage if they were forced to move to other jobs, and added that “those over 55 are simply thrown out of the workforce” (Thurow, 1996). Australian studies confirm that vulnerability to downsizing increases with age, and also makes re-entry to employment extremely difficult (Encel, 1997; Encel and Ranzijn, 2007).

The literature on age discrimination in employment identifies the attitudes of employers as the overriding reason for the difficulties faced by older workers. When asked, employers will concede that older workers may have many virtues such as stability, responsibility, low rates of absenteeism and the like, but in the event they almost invariably give preference to younger people. While over-represented among those targeted for redundancy, older workers also have great difficulties in re-entering the paid work force (Taylor, 2009). In Australia, similar attitudes have been recorded in a series of studies dating back to the 1980s (Encel, 1999).

Women are particularly vulnerable to age discrimination. An American review in the 1980s drew attention to the double standard imposed on women. Middle-aged women attempting to enter the paid labour force after an absence due to family responsibilities are rejected on the grounds of lack of experience, whereas age is the actual determining factor. There may be pressure

to look young and attractive. On the other hand, older women can be eliminated on the grounds of being “over-qualified”. Age and gender thus interact to create a subclass of highly vulnerable workers, subject simultaneously to ageism and sexism (Nuccio, 1989). More succinctly, two British sociologists have summed up the problem as “gendered ageism” (Arber and Ginn, 1995).

Complaints about age discrimination, here and overseas, have increased significantly in recent years. The negative attitude of employers is a recurring theme.

Legislation to ban age discrimination in Australia

Legislation to ban discrimination on a variety of grounds—gender, race, disability, marital status, religion, age and so on—has developed in Australia since the 1970s. The introduction of age as a ground for complaint came relatively late, and continues to have a much lower public profile than gender discrimination, which attracts many more complaints than those based on age.

Age discrimination was banned in a series of laws enacted in the states and the two Territories between 1991 and 1999. The Commonwealth Parliament finally legislated in 2004. Legislation banning compulsory retirement was also enacted during this period.

Administration of the legislation varies between states/territories. In NSW, the relevant body is the Anti-Discrimination Board, and in Queensland, Tasmania and the Northern Territory, the Anti-Discrimination Commission. Victoria, South Australia and Western Australia have established Equal Opportunity Commissions. In the ACT it is the Human Rights Commission.

The Federal Age Discrimination Act was passed in 2004. The Act makes it unlawful to discriminate on the grounds of age, with special reference to employment, education, accommodation, availability of services, and access to premises.

State-based laws against discrimination continue to operate, and a complaint may be taken either to the Australian Human Rights Commission or the corresponding state/territory body.

The limits of legislation

It is notoriously difficult to prove that discrimination is due to age as against other factors (Gaze, 2002; de Plevitz, 2003). The use of coercion by employers, whether obvious or camouflaged, is evident in many of the experiences recorded in the research undertaken for this report, and also in a number of cases dealt with by courts and tribunals (Qantas Airways v Christie, 1998; Allman v Australian Airlines, 1995; Blatchford v Qantas Airways Ltd, 1997; Commonwealth of Australia v Human Rights Commission and Bradley, 1998; Mooney v Commissioner of Police, 2003). It reflects the widespread stereotype that equates age with disability, illness or loss of capacity, and youth with health, energy and ability.

Older workers also suffer disproportionately because the skills and experience acquired at an earlier period are regarded, rightly or wrongly, as less relevant to the new workplace. On top of this, some employers argue that training and retraining of older workers is unprofitable because there would be insufficient return on the investment (Lightning Bolt v Skinner, 2003). Many employers favour youth over age in recruitment and promotion (Steinberg et al, 1998).

One effect of anti-discrimination laws is to change the nature of advertising for applicants. Employers are now forbidden to use age categories in advertising or in selection interviews. Before legislation, age preferences were commonly stated. Advertisers, of course, can use phrases whose implicit bias towards youth is obvious. Bennington made a study of job advertisements and found a variety of terms which were clearly aimed at people under 30, including buzzy, fast-paced, go-getter, high-flyer, can-do, switched-on, on the ball. Another device was to ask for years of experience or the date of graduation (Bennington, 2004).

THE EXPERIENCE OF DISCRIMINATION

How effective are laws in combating age discrimination? This section presents some summarised cases before the NSW Anti-Discrimination Board and the Australian Human Rights Commission. These cases are followed by personal accounts of discrimination.

Cases before the NSW Anti-Discrimination Board

The ADB provided details of ten “closed” cases, which had been “de-identified”. Section 92 of the NSW Anti-Discrimination Act provides that complaints may be settled, resolved, withdrawn or abandoned. The impact of discrimination comes out most clearly in the individual stories, which have been summarised from the files. All names are pseudonymous. The cases have all been categorised according to their dominant feature, although most involve more than one aspect of discrimination.

1. Alleged stigmatisation

Athol worked in the building industry and had multiple skills, for which he received an over-award wage. At the time of his complaint he was 49 and had just returned to work after treatment for a heart condition. One of his workmates said, “You’re only wanted for the milk” {traditionally a junior’s errand on building sites}, nobody loves you and you’ve got no friends”. His foreman, aged about 30, made derogatory and threatening comments to him, such as {...} will make your blood pressure so high that you will have another heart attack”.

A man in his 50s joined the workforce, and after that he and Athol were referred to on many occasions as “fucking geriatrics”. After a constant barrage of abuse the two men chose to leave.

Representatives of the employer and the complainant met at a conciliation conference at the ADB. The employer acknowledged that derogatory remarks had been made, but insisted they were jocular. He pointed out that Athol had been

well-paid and had left the job without notice. Athol accepted a compensation offer of \$5000 and did not take his complaint further.

2. Redundancy

Sheldon held a senior managerial role in a big technology consultancy. The company was formed as a result of a series of mergers and reorganisations, with consequent changes of job title. By 2005, Sheldon was classified as a Principal, and was told that Principals would be accepted as salaried partners. Late one afternoon in April 2005, now aged 60, he was told that the role of Principal was “not working on the east coast”, and he was made redundant.

In his complaint to the ADB, Sheldon attached a copy of an email distributed to staff announcing his departure and that of two other colleagues. The memo described the strategy of the company to “increase the ratio of resources at the entry/intermediate levels of our business...{and}... continuing to create opportunities for development and career progression at the lower levels”. According to Sheldon, this statement implied that the east coast Principals had not been successfully integrated into the practice, cost too much and were blocking the career paths of younger practitioners. He pointed out that only the youngest of the three Principals had been retained.

Sheldon asked for a written apology and the equivalent of 12 months’ salary. The company refused to apologise or pay the sum demanded, but in 2007 it entered into a Deed of Release by which it paid him \$24,166 in settlement of the complaint. Accordingly, the Board terminated the complaint under Section 92A of the ADA.

3. Harassment

Danita, aged 73, was a kitchen hand at a food service company, where she had worked for 23 years. In 2008, the company introduced a new integrated roster system, and Danita was required to work on the Plating Line for at least three months before returning to her previous section. She was soon in difficulties, and was taken to see a manager who asked why she was so slow. She

explained that she had attended school in Fiji only as far as second grade, and although her spoken English was fluent, she could not read fast enough to keep up with the conveyor belt. The manager then offered her a part-time job on the evening shift. When she arrived to take up this offer, Danita found that the job had gone to someone else. Nor was any work available in her previous section. The only option seemed to be return to the Plating Line.

On the Plating Line, harassment and intimidation continued. She was asked repeatedly how old she was and when she was going to retire. “Hardly a day went by without someone making such remarks as ‘How old are you?’ ‘When are you going to retire?’ I felt that because of my age I was always being watched and whenever I made a mistake {...} would pounce on me and drag me off to see the manager.”

In March 2008, Danita and her daughter met a union representative to discuss the matter. She was advised to take up the part-time job as a temporary measure, but was again met with a barrage of questions as to why she did not retire. A company memo referred to her as someone who because of her advanced age was unable to perform all the duties required of her. Finally, in December 2008, Danita and her daughter met with representatives of the ADB and her employer. She succeeded in having her three weeks’ annual leave and two weeks’ sick leave reinstated. The company also undertook to caution staff about making derogatory comments concerning age. She would remain a full-time employee, subject to assessment under Occupational Health and Safety legislation.

Danita subsequently informed the ADB that she was satisfied with the outcome and therefore wished to withdraw her complaint.

4. Screened out by recruitment agency

Adam, aged 36, applied for a job as a specialist IT engineer. The job was advertised by a specialist recruitment agency, to whom Adam sent his C.V. He rang the agency some days later, only to discover that he had not been short-listed for interview. He spoke to a consultant who told him, “I didn’t forward your application to the short-list

because in the past this employer has been burned by employing more mature applicants who have then left the company after their initial 12 months.... I feel the employer is really looking for someone younger, in their twenties.... A younger applicant would be more likely to stay with the firm longer, rather than a more mature applicant who will stay for 12 months and then go off chasing the dollars”.

Adam decided to take the matter further and telephoned the CEO of the recruitment agency, who agreed that the consultant concerned would have to be more cautious in his phrasing. He alleged that the real problem was that Adam’s C.V. was inadequate, to which Adam replied that it had been written by an employment consultant. The CEO then said, “This is a young team, do you really want to work with 20-year-olds?” Adam replied that he did.

When the case was dealt with by the ADB, the recruitment consultant denied making the more ageist remarks alleged in the complaint. He did, however, admit to saying that his client had been “burned” by employing more mature applicants for junior roles. The ADB encouraged the parties to

settle the complaint. Adam’s original claim was for \$10,500 compensation, to which the company responded with an offer of \$1000. Adam finally accepted the sum of \$1500.

Australian Human Rights Commission – Conciliated Cases

The following de-identified cases have been extracted from the annual reports of the Commission between 2004 and 2009.

1. Recruitment

A 48-year-old woman complained about the wording of an advertisement for a position with a real estate firm. The advertisement specified that the firm “seeks a well presented younger applicant...for the position of receptionist/personal assistant”. She claimed that she would have

applied for the position but for the word “younger”, as she had the relevant skills and experience. The company acknowledged that there was no reason for the use of the term “younger”. The company said that the person who placed the advertisement



was in his mid-50s and new to the organisation and his use of the term denoted someone younger than himself. The matter was resolved through a written apology to the complainant.

2. Redundancy

The complainant, aged 60, worked for a recreation club and had been employed for two years as a casual worker, but was made redundant. She claimed that she had been chosen for redundancy because of her age, and that a younger person was subsequently employed in her position. The club denied that a younger person had been employed in her position, but acknowledged that the board of directors was not aware of the general manager's decision to make the position redundant. The club maintained that new staff were employed with specific skills to undertake particular tasks, and the complainant's duties had been incorporated into other positions.

At a conciliation conference, the club agreed to reinstate the complainant to her former position, pay her general damages of \$3000, and write her a letter of apology.

3. Termination

The complainant was aged 65 and the general manager of an export company with a parent company in Kuwait. He was told by the company that he must retire, as the law in Kuwait requires that people over 65 do not remain in employment. The complainant told his employer that he did not wish to retire, but his employment was nevertheless terminated. The company maintained that this was not because of age, but because the company wanted new blood and new vision.

The complaint was resolved by conciliation, and the company agreed to pay \$150,000 in compensation.

4. Alleged discrimination (age combined with sexual discrimination)

The complainant, aged 65, was employed at a local recreation club, doing reception and other general duties. She alleged that she was sexually harassed by a manager who made comments such as, "You have not got very big tits, have you", and "It would be a lot better if you came over here and sat on my face."

The complainant said she injured her back at work and claimed that her supervisor made comments such as "I don't know what you're doing back at your age---it's not going to get any better". Eventually, her employment was terminated.

In response, the club maintained that the complainant's employment was terminated because her back injury prevented her from performing the inherent requirements of her job. The club said she had not made any complaints about sexual harassment during her employment. The manager accused of sexual harassment claimed that he had always treated the complainant with respect and that she had never told him that she was offended by anything he said.

The case was resolved when the club agreed to pay \$40,000 in compensation.

5. Alleged discrimination (age combined with racial discrimination)

The complainant, aged 45, was of Sri Lankan background. He complained of discrimination in his employment as a warehouse assistant, claiming that another employee, younger and of Anglo-Saxon background, was given better hours and provided with more assistance. The complainant also claimed that this other employee would stare at him and make comments such as "black bastards" and "black arse-holes" whenever he passed by. In addition, the complainant alleged that he had not been given promotions and salary increments and had only been paid half of the bonuses due to him.

The company denied any discrimination, and maintained that the two employees the complainant referred to had different duties and different hours of work. The company said the complainant had not been financially disadvantaged and had not raised any concerns with management about racial or age discrimination.

After conciliation, the complainant decided to resign. The company agreed to pay him his resignation entitlements and \$10,000 general damages.

Contributed personal accounts

Altogether, 50 usable personal stories of discrimination were received via the Internet, follow-up interviews and personal contacts. Some examples are included here.

They covered a wide range of causes for complaint about discrimination. Nearly half were about discrimination in recruitment or appointment, and eight related to retrenchment and redundancy. Other issues included gendered ageism, restructuring, pressure to retire, bullying and the style of questions used by interview panels.

Research which relies on personal testimony is regularly criticised on the grounds of subjectivity and bias. It is no doubt true that personal shortcomings may have been as important as age in causing difficulties in some of the accounts. However, a general pattern of discrimination emerges clearly from all sources, including official proceedings before tribunals, so that such criticism may validly be regarded as marginal in importance.

Participants were able to state their grievances in their own words. The original statements have been abridged for reasons of space and names have been altered to maintain anonymity.

1. BJ, age 51, employed part-time.

BJ works for a project entitled “Men’s Sheds”, funded by government, which provides activities for unemployed men and enables them to use skills for which they would otherwise have no outlet. BJ runs a “virtual” men’s shed in a rural area affected by drought. He was employed at middle management level, but decided in his late 40s to find something easier. He suddenly found that getting a job had become very difficult.

It suddenly happened! What’s changed about me? Age is impossible to hide in a resume. I did get a few interviews for jobs to which I was well suited, but the job always went to a younger person. The reasons given were always vague and defensive: “We didn’t think you were right for the job” or “we didn’t think you’d fit in”.

From working with the Job Network and Centrelink, I observed that most employers are aware that it is wrong to discriminate, but have found a variety of ways to get around that. This is mainly an issue for administrative and clerical positions, and much less in the professional, mining and unskilled areas. An employer indicates that he wishes to employ an 18-year-old girl. The agency would advise him that they can’t use this as a specification but will have to settle for “someone who fits the requirements”.

In other words, the agencies make employers aware of the law. Despite this, I saw many cases where a youngster, without experience but with a certificate for office skills, was given the job over an older person with years of office experience but no certificate. On being challenged, employers will say ‘Oh, but we need that certificate!’

2. IG, age 57, art teacher

IG responded to publicity from the NSW Department of Education, encouraging older people to train as teachers. At age 45, she gained her Diploma of Education.

It’s been a complete farce. They say one thing and do another.... I started as a casual teacher and put my name on the list for consideration for a permanent position. I heard nothing. After a few years I contacted the recruitment headquarters to inquire when I could expect a permanent position. What he said to me was, “Basically because of your age you won’t get a permanent position because all the new jobs are offered to new graduates and transfers”. I was gobsmacked.

I worked for six years in a regional centre as a “temporary casual”, on a yearly contract, with day-to-day work. When a new deputy principal arrived in 2007, he sacked all the casuals. He said, “I don’t want you because I’m going to employ younger people to bring a fresh approach.”

None of us considered making a formal complaint about age discrimination. If we had complained, the deputy would have just claimed that we were incompetent, and that would have made it impossible for us when we sought other positions. Since 2007, I have applied for approximately 80

teaching positions in private and state schools, without success. Because I gained my Diploma of Art many years ago, the date alerts prospective employers to my age.

I feel that I have been misled and ill-treated. They've treated me like a dog. I'm 57 but it's not as if I'm past it. I'm good at my job, good at art... Basically casuals have no rights at all. If I'd been permanent it would have been a different matter.

3. Melanie, age 45, private business

Melanie has had a successful career in telemarketing, both in Australia and overseas. For the last four years she has run her own business, but is now seeking to return to events marketing and sponsorship.

In the US and Europe it was never about your age! It was about what you can do! Here in Australia you are dealing with small-minded people and culture.... I can absolutely say that I have been experiencing discrimination about my age. The expressions "overqualified" and "fitting in with our company culture" and "we have a young team here".... the list goes on and on.... Nobody has ever come out and said it, though, until this morning. I spoke with a recruitment agency who had asked for people with "clear proven experience". She said, "May I have your date of birth for our database?" When I replied (and there was no background noise of her typing this into her database), I was told that the employer had categorically stated that he wanted nobody over the age of 30, that they were too difficult to train, and then she told me that I was "overqualified".

Australians are...uncomfortable about working with people of different ages. It is a very young country with a very physical culture. These two factors collide and create small-minded attitudes... Legislation has, if anything, made the situation worse. **Now there are so many innuendoes and things not being said because they can't (legally) be said, but you know it's there—it's the elephant in the room!** Complaining won't do any good because age discrimination is so deeply ingrained within the culture...It would actually be better if age

discrimination could be openly acknowledged as a real screening factor. At the moment, interview feedback is either non-existent or a farce, because no one can talk honestly about age being a reason for rejection. It is all unspoken because everyone knows that it's illegal. It's not so much the discrimination—it's the lies that go along with it.

Going over my interview performance it came as a shock to realise OH! That's why they were asking those questions! It was my AGE! Now it makes sense.

4. Natasha, age 58, general manager

I have been contracting for jobs for years and have recently found the number of clients diminishing. In the past ten months I have applied for more than 110 jobs. I never even got an interview until I took off my resume my date of birth, photo and the first ten years of my working life when I was a piano teacher. Then I did get a couple of interviews, but I never heard from the companies again.

It is my experience and that of my husband that if you become unemployed over 40 years of age it is hard to get back into the workforce. Those people running interviews are at best 30-something and often far younger. Often there are more than 100 applications for advertised jobs and if they find someone younger with the same skills and experience as older applicants, the younger person will be the first to be interviewed. In 1993, I became unemployed at age 42. I was, however, profoundly deaf. Over the next 18 months I applied for 473 jobs and attended 100 interviews. Finally a friend employed me but I had to move interstate. Now I'm 58 and have had a successful cochlear implant and have also completed a BA degree. In 1993, I at least had interviews for 25 per cent of everything I applied for.

Obviously, someone looking at my résumé must guess that I am not young. Whether this is a contributing factor to me not even getting on the "long list" I'm not sure. It is all very well to raise the retirement age to 67, and it is a great idea that as we age we keep our minds active by continuing to work, but where are the employers who employ older people?

5. AZ age 61, project manager

I'm a contractor, providing IT project management services to whoever will pay me a reasonable rate. I have never failed to deliver over a project management career of more than 25 years.

About four years ago, I applied for a project manager position with a large Australian retail organisation. My interview panel of three, none of whom was older than 40, disagreed. The feedback given to my agent was that they were looking for someone with "higher energy levels". At that stage, I was running 40km per week as well as playing tennis and bike riding on a weekly basis, so I can say pretty unreservedly that anyone with higher energy levels would be pretty exceptional. My agent and I both agreed that "higher energy levels" was a euphemism for "younger."

6. Ken, age 61, IT contractor

I have been unemployed for more than two years. In 2007, I completed a traineeship. I then moved to Brisbane to develop my skills further. I applied for jobs -100 in all - and was interviewed for at least half of them but had only two short-term contracts in this time.

It is easy to find excuses other than age discrimination when asking for feedback, but one can learn many things, and one of them is the overwhelming surprise of the selection panels when the face behind the application actually appears. I have done enough of these to know that in some cases the body language says it all and the rest of the interview is just going through the motions.

Having completed my certificate, and with the many skills I have developed, I should be light-years ahead in my career progression. Not so. I can find no valid reason for this other than the desire to discriminate against the aged in this country. Skills shortage? What skills shortage? We're all just wasting away at Centrelink.

7. Teresa, age 63, book publishing

I was working in the industry as a commissioning editor for a general publisher. This industry is notorious for employing "smart young things", all dressed in black. Once you reach a certain age,

despite a strong track record, you're nobody. This is especially true of the big multinationals.

I was retrenched at 61 after a company takeover. I was given five minutes notice, told to leave now (at 5 p.m.) and not to come back the next day. No chance to notify my 100-plus clients, no chance to prepare handover briefs, no chance to say goodbye to my colleagues or even to clear out my desk. Ironically, I was on my way to a business function where I was to represent the company, and I had to make a speech and pretend nothing had happened.

In the course of my career I had been retrenched twice, but both times I got a month's notice and was able to leave things in order and be given a farewell by my colleagues.

I am now living on the old age pension. Not a snowball's chance in hell of getting another job at my age.

8. K.E., age 52, research scientist

K.E. completed a B.Sc. degree, then a Master's in her specialty subject. She left the paid workforce to care for two children, then returned to work as a part-time tutor and study for her Ph.D. Aged 40 when she gained her doctorate, K.E. was told not to expect a research officer's job in her scientific area, dominated by males. Her professor, who was also head of the department, believed that "women lose their zip for research at 40". Some part-time, lower paid jobs as research assistants and demonstrators were usually given to younger people. The young man in charge of temporary positions said he did not want to employ "handbag ladies".

Women in my position were being advised to do a Diploma of Education at their own expense, and then to make a career teaching science in high schools. That was never my career goal. After a few months without a job, I decided to move away from academic science and get another post-graduate qualification which enabled me to move to a new field. I believe that my treatment in my scientific field was unjust. There was no use complaining. I would have been the disgruntled older woman, and he was the eminent professor. Complaining about ageism or sexism is a no-win situation. You're labelled as difficult, and then things get more difficult than ever.

9. V.A., aged 51, State government official

I was shattered by my experience and still find it tough. Everyone's very clever and everyone knows the law, so no one mentions age. It's there, though, they factor it in and they cover it over.

I was one of five managers in my branch of the department. Each of us headed a unit of several people. My performance appraisals were all positive. Two years ago, a new senior executive, aged in her thirties, was given responsibility for the branch. The five managerial positions were reduced to three. The five of us, all aged over 45, found ourselves competing for the three positions, and only one was appointed. We were told to clear our desks and nominate a preferred area for other work. When I asked for feedback on my failure to be reappointed, I was told that in the opinion of the selection panel, I would not be able to learn the required new skills in a reasonable time. I was shattered. You're like the Ghost of Christmas Past. They don't want to hear you. Any corporate memory is seen as the old way, and it doesn't have any value.

I believe that covert age discrimination was a key factor. The four unsuccessful people were all older, shorter and fatter than the new executive. The only one of the five to be reappointed was the youngest, in his early thirties. Although compulsory retirement ages have been phased out, there is still a strong social norm operating. People nearing the age of 60 are expected to leave voluntarily, and if they don't, they are made to feel unwelcome.

There is no chance any of us can work the length of time the Commonwealth expects us to if we have younger managers coming in who are threatened by

us. Some type of scorecard to ensure a balance of employees across the age groups may be the only way to counter age discrimination and sexist attitudes.

Union perspectives

Until very recently, the union movement has shown little interest in the problems confronting older workers. In general, unions have stressed the need to protect existing jobs. This can entail opposition to policies promoting labour force participation by older workers, who may be seen as competitors for their younger counterparts. The Australian Council of Trade Unions (ACTU) adopted a policy on older workers for the first time at its national congress in 2003. The policy opposes age discrimination and supports the rights of workers to continue in employment after the "normal" retiring age (Borowski et al, 2007).

Interviews with union officials showed that age discrimination is now on their radar, with varying degrees of urgency. The Construction, Forestry, Mining and Energy Union (CFMEU) envisages a campaign by unions to introduce quotas for mature age workers on major government building projects. The Finance Sector Union (FSU) was more concerned about the inadequacy of the superannuation system. Consolidation in the finance industry has led to many workers in their fifties being made redundant, with no real prospect of re-employment.

Other unions did not generally use the anti-discrimination legislation, instead preferring retraining of managers in correct behaviour or running awareness campaigns to prevent discrimination.

CONCLUSION AND POLICY IMPLICATIONS

As documented in this report, age discrimination in employment has been acknowledged as a significant issue for many decades in all Western democracies. Australia has been active in enacting laws to give redress to people who have experienced age discrimination. Commonwealth and State legislation has made people aware of the necessity to avoid discrimination, with dual effects. Policies have been framed to ensure that workplace procedures comply with the law, and employers and employees have been made aware of their rights and obligations. However, this awareness also ensures that age is not mentioned in decisions about recruitment, training, career advancement or downsizing.

Both our literature review and our informants have pointed to the continued existence of a disguised form of age discrimination, “the elephant in the room”. The information from ADB, AHRC and personal accounts indicates that the everyday experience of workplace discrimination remains difficult to prove and even when proven, gives little satisfaction to the complainant. Awareness of age discrimination requirements leads often to nimble side-stepping – compliance with the letter rather than the spirit of the law.

Policy implication 1: Policy makers should examine the issue of ‘disguised discrimination’ and strengthen the relevant anti-discrimination legislation to reduce the likelihood of covert discrimination. Broader community education and awareness about the value of older workers is needed.

Australia is a prosperous country with a long tradition of a fair go and a broad consensus about fair treatment at work. Social inclusion policies emphasise participation for all. As the case studies in this report show, age discrimination has severe consequences for families and individuals.

Despite the abolition of mandatory retirement ages, ideas about a social norm of the right age to retire lead to pressure on many older workers.

Australians are leading longer, healthier lives and are being urged by economists and politicians to work longer. Many are keen to do so, while others feel that after a lifetime of hard work they are entitled to an easier life.

The notion of an expected or “normal” age of retirement remains strong and leads to pressure on some older workers, especially when redundancies or restructures take place. In the report, a 2007 ABS survey of 3.9 million workers aged 45 and over is quoted, showing that most respondents hoped not to retire until they were at least 65. This cohort of Australians envisages an active lifestyle in their sixties, with 24% intending to retire at 70 or over. In time, this generation may overcome the community attitudes that have put some of our informants under pressure to leave the workforce around the age of 60.

Policy implication 2: Policies must allow individuals to make their own work or retirement choices in the light of their own health, aspirations, financial status and family situations.

It is evident from this study that age discrimination is alive and well in this country, and that it has devastating impacts on its victims. Legislation and administrative remedies are both necessary, but they alleviate only some of the problems. While Australia’s anti-discrimination laws are to be applauded, the number of conciliated cases reported by the Australian Human Rights Commission and the NSW Anti-Discrimination Board remains modest. To many people, the complaint process with its emphasis on written documents, legal representation, and referral to a higher body where conciliation fails, appears time-consuming, and potentially costly in terms of prolonged effort, emotional distress, legal fees and loss of reputation.

Policy implication 3: There is a need for greater awareness by employees of their rights to complain about age discrimination, and perhaps more information or advice for unions, professional bodies and the like to feel more confident in supporting such complaints by their members.

A campaign launched by the Fair Work Ombudsman in November 2010 is a good start in this direction. New educative material has been prepared to increase awareness among the more than three million working Australians aged over 45 that unlawful discrimination can include refusing to employ, promote or train someone because they are considered too old, or repeatedly offering training and promotion opportunities and overtime and penalty shifts to young staff first. The Fair Work Ombudsman

Executive Director Michael Campbell said that every employee, regardless of how old they are, has the right to work without fear of discrimination³.

It is to be hoped that this campaign, together with initiatives that encourage the training and retention of older workers, will ensure greater progress in the elimination of age discrimination and the promotion of fairness at work. Only then will the elephant in the room cease to be a threat.



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The National Seniors Productive Ageing Centre is an initiative of National Seniors Australia and the Department of Health and Ageing. The Centre's aim is to advance knowledge and understanding of all aspects of productive ageing to improve the quality of life of people aged 50 and over.

The Centre's key objectives are to:

- Support quality consumer oriented research informed by the experience of people aged 50 years and over;
- Inform Government, business and the community on productive ageing across the life-course;
- Raise awareness of research findings which are useful for older people; and
- Be a leading centre for research, education and information on productive ageing in Australia.

For more information about the Productive Ageing Centre, visit www.productiveageing.com.au or call 02 6230 4588.



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