



# Equal Opportunity Tasmania

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## Review of Section 87 of the *Workers Rehabilitation and Compensation Act* 1998 (Tas)

Submission by the Anti-Discrimination Commissioner (Tas)

April 2019

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## Introduction

Thank you for providing me with an opportunity to contribute to Review of section 87 of the *Workers Rehabilitation and Compensation Act 1998* (Tas) (WRC Act).

My interest in this matter relates to the potential age discrimination arising from the current provisions.

I would be happy to elaborate on these matters should you wish me to do so.



**Sarah Bolt**  
ANTI-DISCRIMINATION COMMISSIONER (TAS)

## The Tasmanian context

Tasmania's population is the oldest of all states and territories and is also ageing at the fastest rate. As of 2012, Tasmania had the largest proportional share of people aged 65 years and over. In addition, the number of people aged 85 years and over is growing rapidly.<sup>1</sup>

It is estimated that by the year 2030 one in four Tasmanians will be aged 65-plus and by 2042 almost one-third of our population will be aged 65 years or older.<sup>2</sup>

Importantly, data shows labour force participation rates in Tasmania sharply decline after 55 years of age and remain lower than nationally for all age groups over 45 years.<sup>3</sup>

Whilst declines in workforce participation for older Tasmanians are, in part, reflective of the number of people wanting to permanently exit the workforce once they reach an age at which they can access other income streams such as superannuation, there are also many who remain outside of the workforce because of difficulties in finding or retaining work.

Addressing the low workforce participation rates of older Tasmanians will become increasingly important as changes to the Age Pension qualifying age are introduced because those changes will have a disproportionate impact on people within Tasmania.<sup>4</sup>

The risk of poor attachment to the workforce as Tasmanians age includes increased rates of poverty and financial hardship. Data sourced from the 2011 census indicated approximately 64% of Tasmanians aged 65+ live under the poverty line of \$400 per week. This compares with approximately 30% of all Tasmanians who live on or below the poverty line.<sup>5</sup> At the same time, Tasmania has a disproportionately high number of older people living in households reliant on government pensions as their main source of income (21% of Tasmanians aged 55–64 years; 66% of Tasmanians aged 65–74 years; and 81% of Tasmanians aged 75+ years).<sup>6</sup>

While the rationale for changing the eligibility criteria for the Age Pension relates principally to increases in life expectancy, unless barriers to employment (including age discrimination) are

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<sup>1</sup> Council of the Ageing (Tasmania), *Facing the Future: A baseline profile on older Tasmanians* (Department of Premier and Cabinet, 2013).

<sup>2</sup> J Temple, *Past present and future of mature age labour force participation in Australia: How do regions differ?* (National Seniors Productive Ageing Centre, Melbourne, April 2014) 20.

<sup>3</sup> Council of the Ageing (Tasmania), above n 1, 115.

<sup>4</sup> Both because of size of the ageing population and the generally lower levels of income earned during working life in Tasmania.

<sup>5</sup> Council of the Ageing (Tasmania), above n 1, 77.

<sup>6</sup> Ibid.

addressed, many people beyond their mid-fifties will find it difficult to retain or gain employment and will be reduced to living off lower levels of income support.

This may occur for a range of reasons, including ill health and workplace injury.

ABS figures indicate that in 2016-17 of the 3.9 million persons aged 45 years and over in the labour force, 1.6 million (or 40%) did not know the age at which they would retire and for those that did indicate an age at which they intended to retire, 20% said it would be at 70 years or older.<sup>7</sup> Further, the most common factor influencing the decision to retire was not whether they were eligible for an age pension, but whether they were financially secure (41% of men and 34% of women) or the status of their personal health or physical ability (21% for both men and women).

At the same time, the average age at which a person intended to retire (65 years) was considerable older than actual average age at retirement which for persons aged 45 years and over in 2016-17 was 55.3 years.<sup>8</sup> In fact the age of persons exiting the workforce in 2016-17 because they were eligible for superannuation and/or a pension (63.5 years) was considerably older than:<sup>9</sup>

- those who exited the workforce due to retrenchment or dismissal from employment or because there was no work available (58.9 years)
- those ceasing employment because of lack of access to satisfactory work arrangements/part-time work (56.1 years)
- those ceasing work because of the need to undertake caring responsibilities (57.1 years)
- those who left because of sickness, injury or disability (54.6 years)

Addressing the reasons people exit the workforce early is therefore likely to result in many older workers remaining in employment for longer periods. It makes little sense therefore that additional barriers, such as limited access to workers compensation, should make this harder.

The average age at which a person exits the workforce due to injury, sickness or disability is almost 9 years younger than for those people who exit because they are eligible for superannuation and/or a pension (62.8 years). As changes to the pension age and superannuation eligibility criteria flow on to existing workers it is expected the average age at

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<sup>7</sup> Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia 2016-17* (Cat. No. 6238.0, released 20 December 2017) Table 9.

<sup>8</sup> Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia 2016-17* (Cat. No. 6238.0, released 20 December 2017) Table 3.

<sup>9</sup> Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia July 2012–June 2013* (Cat No. 6238.0, Canberra) Table 6.



which a person exits the workforce will increase, thereby increasing the gap with those who are forced to depart early from the workforce due to injury, sickness or disability.

Whilst for some people sustaining an injury, sickness or illness leaves them with little option other than to permanently retire from the workforce, for many others it is apparent barriers to accessing worker's compensation and/or income protection insurance are encouraging early exit.

It is critical therefore that factors preventing older Tasmanians remaining in the workforce, including after compensable injury, are addressed.

The provisions contained in section 87 of the WRC Act are poorly reflective of a modern workforce in which retirement ages have largely been removed from awards. Few awards in Tasmania contain compulsory retirement provisions. Notable exceptions are the *Police Services Act 2003* (Tas) which requires a police officer to retire once they reach the age of 65 years and Supreme Court Judges and Magistrates who are subject to a compulsory retirement age of 72 years under the *Supreme Court Act 1987* (Tas) and the *Magistrates Court Act 1987* (Tas) respectively. Both of these instances have also been identified by the Anti-Discrimination Commissioner as giving rise to potential age discrimination.

## Protections under Tasmanian discrimination law

Both direct and indirect discrimination on the basis of age and disability in relation to employment are unlawful under the Tasmanian *Anti-Discrimination Act 1998* (Tas) (the ADA).

**Section 14(2)** of the ADA provides that direct discrimination takes place if a person (including a corporation or organisation):

...treats another person on the basis of any prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.

**Section 15(1)** provides that indirect discrimination takes place if

...a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who –

- (a) share, or are believed to share, a prescribed attribute; or
- (b) share, or are believed to share, any of the characteristics imputed to that attribute –  
more than a person who is not a member of that group.

**Sections 14(3) and 15(2)** of the ADA provide that it is not necessary that the person who discriminates is aware that the practice or requirement is discriminatory.

The prohibition of discrimination on the basis of age and disability under Tasmanian law is, however, subject to a number of exceptions. Exceptions are defences whereby otherwise unlawful conduct is not unlawful if the respondent person or organisation can establish on the balance of probabilities that the circumstances are such that the exception properly applies. A person can still make a complaint about those actions and in those circumstances a respondent wishing to take advantage of the exception will generally be required to prove that the exception applies.

**Section 24** of the ADA provides that a person may discriminate against another person if it is reasonably necessary to comply with –

- (a) any law of this State or the Commonwealth; or
- (b) any order of a commission, court or tribunal.

Whilst it is open to the Tasmanian Anti-Discrimination Commissioner under section 6(g) of the ADA to examine any legislation and report to the Minister as to whether it is discriminatory or not, once that legislation is in place the extent of the Commissioner's authority with respect to accepting complaints about actions taken to comply with provisions within those laws is limited by section 24(a), but only where those actions are 'reasonably necessary' to achieve compliance.

**Section 34** of the ADA permits discrimination in the provision of insurance and financial services for particular age groups on the following basis:

- (1) A person may discriminate against another person on the ground of age in the provision of services relating to any annuity, insurance, loans, credit or finance if the discrimination –
  - (a) is based on actuarial, statistical or other data from a reliable source; and
  - (b) is reasonable having regard to that data and any other relevant factors.
- (2) Subsection (1) only applies if a person discloses to the Tribunal, when required to do so –
  - (a) the sources on which the data are based; and
  - (b) the relevant factors on which the discrimination is based.

In general this means that any age limits on access to workers compensation must be based on actuarial, statistical or other data which is capable of clearly justifying the imposition of age limits and that the decision to treat older workers differently from others in the workforce is reasonable having regard to that data and all relevant factors.

**Section 35** of the ADA provides that a person may discriminate against another person on the ground of age in relation to:

- (a) voluntary or compulsory retirement; or
- (b) voluntary severance.

**Section 36** provides that a person may discriminate on the basis of age in relation to employment if the discrimination is based –

- (a) on a genuine occupational qualification or requirement in relation to a particular position;  
or
- (b) on wage rates that are based on age.

**Section 45(a)** provides that a person may discriminate against another person on the ground of disability in relation to employment if –

- (a) the other person –
  - i. is unable to carry out the inherent requirements of the employment; or
  - ii. in order to carry out those inherent requirements would require services or facilities not reasonably required by a person without a disability, the provision of which would impose unjustifiable hardship on the person so discriminating; or



The latter is particularly important in the context of considering reasonable adjustments to assist workers who have been injured in returning to work. If a worker has been injured in the course of their work and an adjustment could have reasonably been provided to enable that to occur and was not, then a finding of indirect discrimination could follow. Failure to consider reasonable adjustments that would enable an injured worker to return to work (regardless of age) risks leaving that employer open to complaint.

Another exception applies where the discrimination 'is for the purpose of carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a prescribed attribute'<sup>10</sup> or is through a 'program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute'.<sup>11</sup>

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<sup>10</sup> *Anti-Discrimination Act 1998 (Tas)* s 25.

<sup>11</sup> *Anti-Discrimination Act 1998 (Tas)* s 26.

## The effect of current Section 87 provisions of the *Workers Rehabilitation and Compensation Act 1998*

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### **87. Cessation on account of age of entitlement to weekly payments**

(1AA) In this section –

**pension age**, in relation to a worker, means the pension age, within the meaning of the *Social Security Act 1991* of the Commonwealth, in relation to the worker.

(1) Subject to subsection (2), an entitlement of a worker to weekly payments of compensation under section 69 in relation to an injury in respect of which an employer is liable to pay compensation under this Act ceases –

(a) if the injury occurs 12 months or more before the date on which the worker attains the pension age – on the date on which the worker attains the pension age; or

(b) if the injury occurs less than 12 months before the date on which the worker attains the pension age – on the date one year after the injury occurs.

(2) Where the terms and conditions of a worker's employment are such as to permit him or her to continue in that employment beyond the date on which the worker attained the pension age, the worker may refer to the Tribunal for determination the question as to whether or not the provisions of subsection (1) should apply to him.

(3) In any case referred to it pursuant to subsection (2), if the Tribunal is satisfied –

(a) that the terms of the worker's employment would have entitled him or her to continue in that employment beyond the date on which the worker attained the pension age and the worker, but for the injury referred to in subsection (1), intended to continue in that employment beyond that age; and

(b) that the incapacity of the worker resulting from that injury will continue beyond the date on which he or she attains the pension age–

the Tribunal may determine that weekly payments of compensation may be continued beyond the dates mentioned in subsection (1) and shall determine the period for which such payments are to be continued.

### **The effect of current provisions**

The effect of the way in which section 87 is currently drafted is to minimise eligibility for workers compensation based on a person's age unless the Workers Rehabilitation and Compensation Tribunal agrees to extend weekly payments beyond the pension age:

- under section 87(1)(a) a worker injured 12 months or more prior to pension age may have their entitlement restricted by whatever period of time they would have ordinarily been eligible to receive benefits save for the imposition of the age pension cut-off date.



- under section 87(1)(b) a worker injured less than 12 months prior to pension age is only eligible for compensation for 12 months notwithstanding the period of time they would have been eligible but for the imposition of this benefit restriction.

Further, whilst sections 87(2) & (3) enable a worker to receive payments beyond those stipulated under section 87(1), the worker must make the application to the Tribunal and the worker bears the onus of satisfying the Tribunal that the statutory test applies. That is, the worker must satisfy the Tribunal that not only does the terms of their employment permit them to continue working, but that they intended to do so. In effect this creates a presumption against working beyond pension age unless there is proof of that intention.

Section 87 of the WRC Act establishes a *prima facie* case of discrimination in the way it treats older workers both by restricting access to compensation benefits and by requiring those who are approaching pension age to seek a determination to extend weekly payments beyond the pension age.

Requiring a person who is disadvantaged by a policy or practice to establish why they should not be subject to that disadvantage is at odds with the underlying principles of discrimination law. That is, an exception (or intention to treat a person less fairly on the basis of a protected attribute) should only apply where it is reasonable to do so and that the onus is on those wishing to take advantage of the exception to make that case.

The intention of amendments to the WRC Act in 2017 was to remove direct reference to a specific age in the Act because of changes to the age at which a person would be eligible to receive an age pension. In its place, however, the Act has substituted another form of discrimination by including a requirement that persons whose terms and conditions of employment allow them to work past the pension age be required to seek a determination by the Tribunal on the period for which such payments should be continued. The effect of the current provision is to shift the onus of proof to the worker who must be able to demonstrate their intention to work beyond the age at which they are eligible for the age pension.

We also consider the legislation lacks clarity in relation to a person who remains in the workforce and suffers a compensable injury **after** they have reached pension age. On one reading given that there are no provisions similar to those in section 87 for workers who remain in the workforce after having reached pension age, it is presumed that this group of workers are able to access workers compensation on the same terms as all other injured workers.

## **Retirement Age and eligibility for Age Pension**

There are several issues relevant to consideration of this matter.

First, the interaction between eligibility for the age pension and retirement age.

From 1 July 2017 the aged pension age was set at 65 years and 6 months depending on a person's birthdate. After this date the age pension age will go up 6 months every 2 years until July 2023 to 67 years as follows:<sup>12</sup>

<b>If your birthdate is</b>	<b>you'll be old enough at</b>
1 July 1952 to 31 December 1953	65 years and 6 months
1 January 1954 to 30 June 1955	66 years
1 July 1955 to 31 December 1956	66 years and 6 months
From 1 January 1957	67 years

Whilst eligibility to apply for the pension exists at these ages, there is no guarantee that a person will receive a benefit. If an injured person's partner has income at or above a certain level, the injured worker may not be eligible for assistance and may be forced to rely on other sources of income support.

This is particularly relevant in relation to older women. ABS figures, for example, indicate that in 2016-17 for women aged 45 years and over who have retired from the labour force, 37% reported 'partner's income' as their main source of funds for meeting living costs compared to 9% of men.<sup>13</sup> In some circumstances reliance on a spouse for financial support can place a person in a vulnerable position, for instance, older women who experience domestic violence.

At the same time for most employees there is no set retirement age which means that many individuals are able to work beyond the minimum age at which they are eligible for superannuation or a pension.

In effect this means that the way is open for a person to remain in the workforce beyond retirement age and statistics suggest that Australians are increasingly doing so. As a consequence, legislation governing workers compensation which is pegged to a 'pension age' in many instances will not equate with a person's preferred age of retirement.

As we have outlined earlier, the changing composition of Australia's population and in particular the ageing of the workforce has meant that many of Australia's policy settings expect or encourage workers to continue to participate in the labour force beyond retirement age. This is

<sup>12</sup> [www.humanservices.gov.au](http://www.humanservices.gov.au)

<sup>13</sup> Australian Bureau of Statistics, Retirement and Retirement Intention, Australia 2016-17 (Cat. No. 6238.0, released 20 December 2017) Table 6.



leading to a change in profile of the participation rates of older workers and older Australians are engaging in paid work to a much greater extent than their predecessors.<sup>14</sup>

The change has been particularly pronounced in relation to older women, with participation rates of women reaching historic highs.<sup>15</sup>

The availability of flexible work arrangements that facilitate a staged approach to retirement (as evidenced by the inclusion of a right to request flexible work arrangements in National Employment Standards for workers over 55 years of age) also acts to facilitate working beyond pension age.

Against this background, it is clearly discriminatory to assign an arbitrary point to the availability of workers compensation simply because a worker is at a particular age. The notional age at which a person is eligible to receive the age pension cannot be equated to a retirement age and has never been intended to do so.

## Onus of Proof

EOT is strongly of the view that there is a need to remove the presumption that a person does not intend to work beyond pension age and any requirement that an eligible worker must prove their intention to do so.

Workers compensation is a form of insurance payment to employees who are injured at work or become sick due to their work. Notwithstanding the provisions of section 24 of the ADA, section 34 of the ADA permits discrimination in the provision of insurance and financial services for particular age groups in certain circumstances:

- (3) A person may discriminate against another person on the ground of age in the provision of services relating to any annuity, insurance, loans, credit or finance if the discrimination –
  - (a) is based on actuarial, statistical or other data from a reliable source; and
  - (b) is reasonable having regard to that data and any other relevant factors.
- (4) Subsection (1) only applies if a person discloses to the Tribunal, when required to do so –
  - (a) the sources on which the data are based; and
  - (b) the relevant factors on which the discrimination is based.

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<sup>14</sup> P Gahan, R Harbridge, J Healy & R Williams 'The Ageing Workforce: Policy Dilemmas and Choices' *Australian Journal of Public Administration*, vol 76, no 4. December 2017 p 514

<sup>15</sup> Australian Bureau of Statistics, *Labour Force, Australia, January 2018* (Cat. No. 6202.0 released 15 February 2018)

In general this means that any age limits on access to workers compensation must be based on actuarial, statistical or other data which is capable of clearly justifying the imposition of age limits and that the decision to treat older workers differently from others in the workforce is reasonable having regard to that data and all relevant factors. Importantly, however, responsibility for proving the exception rests with the insurer.

It is difficult to determine on the basis on information available to EOT whether the current aged limits set on compensation in the WRC Act are predicated on such information.

Data available from the Australian Bureau of Statistics show that older workers (person aged over 65 years) record a relatively low rate of work-related injuries and illnesses.<sup>16</sup> Information contained in the Issues paper supports the view that the portion of injuries to persons 65 years and over remains much lower than the percentage of persons aged 65 years and over in the workforce and is only a small proportion of total compensation payments.

Further, information made available during parliamentary debate on the Workers Rehabilitation and Compensation Amendment Bill 2016 which introduced the current s 87 provisions suggests that actuarial assessment would result in only a limited increase in cost to the scheme. It is noted from the information supplied in the options paper that the number of applications to extend weekly payments beyond the pension age is relatively small.

## **Section 69B**

Section 69B sets the amount of compensation benefits payable according to the level of incapacity.

Removal of all age based distinctions (including the requirement to seek a determination by the Tribunal) would mean that a worker of any age would be entitled to the same weekly compensation payments as set out in section 69B of the WRC Act. That is up to 20 years (in line with the level of whole person impairment up to 30%).

However by virtue of the current working of section 69B(1)(c)(iv) those workers who have a whole person impairment (WPI) of greater than 30% the entitlement would cease on the date on which the worker attained the pension age or on the date one year after the injury occurred.

Section 69 does this by virtue of linking the period for which benefits are payable to section 87.

This creates an anomaly in that a person with a lesser level of impairment may be eligible for a much longer period of payment than a person who is approaching retirement who suffers a more severe injury (of greater than 30% WPI) and would presumably mean that a person who is injured to a severe level (greater than 30% WPI) at an age beyond being eligible for the pension would not be eligible for any compensation whatsoever.

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<sup>16</sup> Australian Bureau of Statistics, Work Related Injuries, Australia, July 2017-June 2018 (Cat. No. 6324.0, released 30 October 2018)



Whilst EOT understands that few workers would have a level of entitlement that would extend for this period of time, the fact that an older worker is severely injured should not mean that limits are placed on their entitlement to compensation.

A younger worker who is injured, even if they were on their last day of work with a particular employer or were a casual employee, would not have their entitlement to compensation restricted simply because they had no ongoing work relationship with their employer. Neither should this be the case for older workers.

EOT considers these provisions to be discriminatory and seeks amendment to section 69B to ensure that older workers are not subject to detriment by these provisions.

### **Options for reform**

Removal of age-based restrictions in the WRC Act would remove the current discriminatory provisions and ensure that mature age workers have access to compensation for injuries sustained in the course of work on the same basis as all other employees. It would act as an incentive to ensure that older persons remain in the workplace and provide assurance that if an older person is injured they will not be forced into retirement or to experience the uncertainties associated with an unknown level of entitlement and the need to seek a Tribunal determination regarding future payments. It would also encourage employers and commercial insurers to make equal provision for all workers, without discrimination in relation to age.

Neither Queensland nor New South Wales have age-based restrictions on compensation entitlements.

EOT considers this is the least discriminatory option.