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**Submission of the  
HUMAN RIGHTS AND EQUAL OPPORTUNITY  
COMMISSION  
to the  
HOUSE OF REPRESENTATIVES  
STANDING COMMITTEE ON  
LEGAL AND CONSTITUTIONAL AFFAIRS  
on the  
INQUIRY INTO OLDER PEOPLE AND THE LAW**

**15 December 2006**

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# Submission

to

House of Representatives Standing Committee  
on Legal and Constitutional Affairs

## **Inquiry into Older People and the Law**

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The Secretary  
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on Legal and Constitutional Affairs  
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Canberra ACT 2600  
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Dear Secretary,

**Re: Inquiry into Older People and the Law**

Please find attached a Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law.

HREOC thanks the Committee for this opportunity to make a submission and looks forward to your consideration of the matters raised.

Yours sincerely

**John von Doussa QC**

15 December 2006

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## List of Abbreviations

ADA	<i>Age Discrimination Act, 2004 (Cwth)</i>
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
DDA	<i>Disability Discrimination Act, 1992 (Cwth)</i>
EOWA	Equal Opportunity for Women in the Workplace Agency
HREOC	Human Rights and Equal Opportunity Commission
HREOCA	<i>Human Rights and Equal Opportunity Commission Act, 1986 (Cwth)</i>
Older people	People aged over 65 years
RDA	<i>Racial Discrimination Act, 1975 (Cwth)</i>

# 1 Introduction

- 1.1 The Human Rights and Equal Opportunity Commission (HREOC) submits this document pursuant to its legislative functions under section 53 (1) of the *Age Discrimination Act 2004* (the ADA), section 67(1) of the *Disability Discrimination Act 1992* (DDA) and sections 11(1) and 31 of the *Human Rights and Equal Opportunity Commission Act 1986* (HREOCA).
- 1.2 The Standing Committee on Legal and Constitutional Affairs wrote to HREOC on 20 September 2006, inviting a submission in relation to the Inquiry's Terms of Reference specifically:

*to investigate and report on the adequacy of current legislative regimes in addressing the legal needs of older (65 years and over) Australians in the following specific areas (and considering the relevant experience of overseas jurisdictions):*

- *Fraud;*
- *Financial abuse;*
- *General and enduring 'power of attorney' provisions;*
- *Family agreements;*
- *Barriers to older Australians accessing legal services; and*
- *Discrimination.*

- 1.3 HREOC notes that these terms of reference relate principally to material benefits and the Standing Committee may at some future time consider it appropriate to inquire into broader human rights issues for older people.
- 1.4 HREOC welcomes the opportunity to makes this submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law.

## 2 Summary

- 2.1 The purpose of this submission is to provide background information to assist the Standing Committee.
- 2.2 HREOC is responsible for furthering the objects of the ADA, and for receiving complaints of unlawful discrimination under Federal anti-discrimination legislation, including discrimination on the ground of age. Information on those matters is given in Section 6 of this submission.
- 2.3 The ADA came into operation on 23 June 2004. HREOC is still at an early stage of its research and program development in relation to discrimination against older people. This submission does not argue for changes in the ADA, save in respect of 5 issues that were identified by HREOC as shortcomings in the Bill to enact the ADA but were not accepted during the passage of the legislation through Parliament. These issues are set out in Section 7 of this submission.
- 2.4 The legislative regimes in the other specific areas of concern identified in the Inquiry's Terms of Reference are not within the legislative remit of HREOC. However this submission provides references to information concerning the needs of older people in these areas which has come to the attention of HREOC in its background research on discrimination. The information may be of assistance to the Standing Committee.

### 3 Snapshot of older people in Australia

- 3.1 Australia faces a pronounced ageing of its population over the next forty years. One quarter of Australians will be aged 65 years or more by 2044–45, roughly double the present proportion. The proportion of the 'oldest old' (those aged over 85) will increase even more.<sup>1</sup>
- 3.2 While approximately two-thirds of Australia's older people live in family households, recent trends such as decreasing birth rates, smaller families, higher incidence of childlessness and increased divorce rates have meant that the number and proportion of older people living alone has increased from around one fifth in 1971 to more than one quarter in 2001.<sup>2</sup>
- 3.3 A decreasing percentage of older men are participating in the paid workforce, while rates for women have been on the increase. In 1971, 22 per cent of men aged 65 years and over were participating in the labour force decreasing to 12 per cent in 2001. At the same time, labour force participation rates for older women increased slightly from 4 to 5 per cent.<sup>3</sup>
- 3.4 Amongst people aged 65 years and over the rate of disability increases with age, rising from 41 per cent of people aged 65 to 69 years to 92 per cent of people aged 90 years and over.<sup>4</sup>
- 3.5 Older people often find themselves providing care for another person. The likelihood of a person providing care to someone else increases with age, peaking for women between the ages of 55 years and 64 years and for men aged over 75. Twenty two per cent of men and 19 per cent of women aged between 65 and 74 are carers.<sup>5</sup>
- 3.6 In 2001, one in three older Australians had been born overseas, and almost two thirds came from culturally and linguistically diverse backgrounds.<sup>6</sup>
- 3.7 Indigenous people comprise slightly less than 0.5 per cent of Australia's older people (aged 65 years and over).<sup>7</sup> Slightly less than three per cent of the Indigenous population is aged 65 years or over compared to 13 per cent of the broader Australian population.
- 3.8 More statistical details about older people are contained in Appendix 1.

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<sup>1</sup> Australian Government Productivity Commission *Economic Implications of an Ageing Australia* April 2005 Productivity Commission Canberra pxii

<sup>2</sup> Australian Bureau of Statistics (ABS) *Census of population and housing: Ageing in Australia* Cat. No. 2048.0 2001 ABS Canberra

<sup>3</sup> ABS *Census of population and housing: Ageing in Australia* Cat. No. 2048.0 2001 ABS Canberra

<sup>4</sup> ABS *Disability ageing and carers: Summary of findings* Cat. No. 4430.0 2003 ABS Canberra p5.

<sup>5</sup> *Ibid*, p49.

<sup>6</sup> AIHW *Older Australia at a glance 2002* (3<sup>rd</sup> edition) AIHW Cat. No. AGE 25. Canberra AIHW & DOHA p3.

<sup>7</sup> ABS *Census of population and housing: Ageing in Australia* Cat. No. 2048.0 2001 ABS Canberra p21



## 4 HREOC's role in relation to older people

### General role

- 4.1 HREOC is a national independent statutory body, established in 1986 by an Act of the federal Parliament, the *Human Rights and Equal Opportunity Commission Act 1986* (HREOCA). The federal Attorney General is the Minister responsible for HREOC.
- 4.2 Under the legislation administered by HREOC, it has responsibilities for inquiring into alleged infringements under five anti-discrimination laws - the *Racial Discrimination Act 1975* (RDA), the *Sex Discrimination Act 1984* (SDA), *Disability Discrimination Act 1992* (DDA) and the *Age Discrimination Act 2004* (ADA) as well as inquiring into alleged infringements of human rights and equal opportunity in employment under the HREOCA.
- 4.3 In addition, the Aboriginal and Torres Strait Islander Social Justice Commissioner has specific functions under the HREOCA and under the *Native Title Act, 1993*. These functions relate to the monitoring of the enjoyment or otherwise by Indigenous people of their rights under the law.
- 4.4 Matters which can be investigated by HREOC include discrimination on the grounds of age, race, colour or ethnic origin, sex, sexual harassment, marital status, pregnancy, or disability.
- 4.5 Human rights education is one of the core responsibilities of HREOC along with the investigation and attempted resolution of complaints about breaches of human rights and anti-discrimination legislation.
- 4.6 HREOC plays a central role in contributing to the maintenance and improvement of a tolerant, equitable and democratic society, through its public awareness and other educational programs aimed at the community, government and business sectors. These programs provide information and strategies to improve the enjoyment of human rights in Australia, the key message being that the elimination of discrimination and harassment are prerequisites for the enjoyment of human rights by all Australians.

### HREOC's role in relation to age discrimination

- 4.7 Since 1990 HREOC has had the power to inquire into and attempt to conciliate complaints alleging age discrimination in employment and occupation.<sup>8</sup> From 1996, a number of reports under HREOCA concerning discrimination based on age in employment and occupation have been provided to the Attorney-General and tabled in Parliament.<sup>9</sup>

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<sup>8</sup> Regulation 4(a)(i) of the Human Rights and Equal Opportunity Commission Regulations 1989.

<sup>9</sup> Report No.1- Compulsory age retirement (1996); Report No.2 - Redundancy arrangements and age discrimination (1997); Report No.4 - Age discrimination in trade union membership (1997); Report No.8 - Age discrimination in the Australian Defence Force (2000); Report No.11 - Discrimination on the ground of age (2002); Report No.14 - Report of an inquiry into a complaint by Mr Andrew Hamilton of age discrimination in the Australian Defence Force.

- 4.8 In May 2000 HREOC produced its report *Age Matters: a report on age discrimination ('Age Matters')*. This report recommended enactment of comprehensive federal age discrimination legislation and the review and amendment of a number of Commonwealth laws that contained age discriminatory provisions.<sup>10</sup> In reports to Parliament on age discrimination complaints in 1996 and 1997, the then Human Rights Commissioner also recommended the enactment of federal age discrimination legislation.<sup>11</sup>
- 4.9 In December 2002, the federal Government (with the assistance of a Core Consultative Group of which HREOC was a part) released an Information Paper containing proposals for Commonwealth age discrimination legislation.<sup>12</sup> HREOC, as part of the Core Consultative Group, was involved in the consultation process on the development of this paper and the federal age discrimination legislation. HREOC also put forward a response both to this information paper<sup>13</sup> and to the Senate Inquiry considering the Age Discrimination Bill in 2003.<sup>14</sup>
- 4.10 The ADA was enacted in June 2004 and came into force on 23 June 2004. It prohibits direct and indirect discrimination on the basis of age in key areas of public life
- 4.11 Following the introduction of the ADA, HREOC's responsibilities under the Act are to:
- promote understanding of, and compliance with the Act;
  - inquire into complaints of age discrimination and attempt to conciliate them;
  - disseminate information about age discrimination and how to avoid it;
  - undertake research and community education to promote the objects of the Act;
  - intervene, with the leave of the Court, in proceedings which involve issues of age discrimination; and
  - grant temporary exemptions to the Act.

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<sup>10</sup> At pp 107-119.

<sup>11</sup> Report No.1 – Compulsory Retirement Age (1996); Report No.2 - Redundancy arrangements and age discrimination (1997).

<sup>12</sup> Attorney Generals Department *Information Paper Proposals for Commonwealth Age Discrimination Legislation* December 2002 Commonwealth of Australia Canberra

<sup>13</sup> HREOC *Response to Information Paper Proposals for Commonwealth Age Discrimination Legislation* December 2002 HREOC Sydney February 2003: this document can be found at [www.humanrights.gov.au/legal/age\\_discrimination\\_legislation.html](http://www.humanrights.gov.au/legal/age_discrimination_legislation.html)

<sup>14</sup> HREOC *Submission of the Human Rights and Equal Opportunity Commission to the Senate Legal and Constitutional Legislation Committee on the Age Discrimination Bill 2003* HREOC Sydney: this document can be found at [www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/age03/submissions/sub09.doc](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/age03/submissions/sub09.doc)

## 5 Discrimination against older people in Australia

### Introduction

- 5.1 Discrimination against older people in Australia has been well documented in a variety of previous inquiries.<sup>15</sup> While many older people feel they have been discriminated against or treated unfairly because of their age, this treatment often does not amount to unlawful discrimination under either federal or state law or may be perceived to be difficult to prove in the context of making a complaint.
- 5.2 Discrimination occurs when a person or a group of people are treated less favourably than another person or group because of their age, race, colour national or ethnic origin; gender or marital status; disability; religion or political beliefs; sexual preference; or some other central characteristic.
- 5.3 Discrimination occurs when a person is denied the opportunity to participate freely and fully in normal day-to-day activities. It might include harassment in the workplace or being denied a job or a promotion; being denied entry to public places and other facilities; being denied goods and services; difficulty in obtained appropriate accommodation and housing.
- 5.4 Discrimination can either be direct or indirect.
  - Direct discrimination takes place when an individual is disadvantaged or treated less favourably than another person because of a particular characteristic. An example of direct discrimination against an older person is failing to employ someone because of their age.
  - Indirect discrimination happens when a practice or policy appears to be fair because it treats everyone the same way but actually disadvantages people from a particular group. An example of indirect discrimination against an older person might be requiring all people who apply for a certain job to pass a fitness test, even though a high level of fitness is not necessary for the job. This test might exclude more older people than younger people.
- 5.5 The following sections detail information about the legal framework for addressing discrimination against older people and age discrimination complaints made to HREOC since the introduction of the Age Discrimination Act (ADA) in 2004.

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<sup>15</sup> See for example, HREOC's *Age Matters 2000*; Attorney Generals Department *Information Paper Proposals for Commonwealth Age Discrimination Legislation* December 2002 and the *Senate Legal and Constitutional Legislation Committee Inquiry on the Age Discrimination Bill 2003*

## The Age Discrimination Act

- 5.6 The Age Discrimination Act (ADA), prohibits direct and indirect discrimination on the basis of age in key areas of public life including employment, education, accommodation, provision of goods, services and facilities, the administration of Commonwealth laws and programs, access to premises, selling or other dealings with land, and requests for information.
- 5.7 The objects of the ADA are:
- to eliminate, as far as possible, discrimination against persons on the ground of age in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information; and
  - to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of age, as the rest of the community; and
  - to allow appropriate benefits and other assistance to be given to people of a certain age, particularly younger and older persons, in recognition of their particular circumstances; and
  - to promote recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights; and
  - to respond to demographic change by: removing barriers to older people participating in society, particularly in the workforce; and changing negative stereotypes about older people;
  - bearing in mind the international commitment to eliminate age discrimination reflected in the Political Declaration adopted in Madrid, Spain on 12 April 2002 by the Second World Assembly on Ageing.
- 5.8 The ADA prohibits discrimination on the basis of age generally, and is not specifically aimed at older or younger people.
- 5.9 The ADA aims to implement Australian obligations under a range of international human rights instruments specifically the *International Labour Organization's Discrimination (Employment and Occupation) Convention 1958* (ILO 111)<sup>16</sup> the *International Covenant on Civil and Political Rights*<sup>17</sup>, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child*.<sup>18</sup>

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<sup>16</sup> Schedule 1 to HREOCA

<sup>17</sup> Schedule 2 to HREOCA

<sup>18</sup> Schedule 2 of HREOCA

5.10 As a member State Australia has participated in the development of the Principles for Older Persons endorsed by the United Nations General Assembly in 1991 and the Madrid Political Declaration and International Plan of action on Ageing adopted at the United Nations Second World Assembly on ageing in 2002. Further information on these instruments is found at Appendix 2.

## 6 Complaints of age discrimination

### Complaints of age discrimination to HREOC under the ADA

- 6.1 Since the introduction of the ADA on 23 June 2004 HREOC has received 184 complaints of age discrimination.
- 6.2 HREOC also receives enquiries in relation to discrimination which may be by telephone (largely), email (including through the Commission's website), TTY or in writing. Of enquiries received by the Commission since the introduction of the ADA, there have been 207 enquiries in relation to a person being 'too young', 748 in relation to a person being 'too old' and 23 enquiries in relation to compulsory retirement. In the same period there were 184 complaints of age discrimination
- 6.3 HREOC's 2000 Age Matters report on age discrimination found that many older people report concerns about discrimination resulting from negative attitudes and stereotypes about older people, which result in discriminatory treatment in the workplace, difficulties in accessing financial and insurance services and products, inequity in treatment in relation to health care and accommodation, and restrictions on immigration and drivers' licencing.
- 6.4 These findings largely reflect complaints of being 'too old' which have been subsequently made to HREOC since the introduction of the ADA.
- 6.5 In 2004-05, 49 of 78 complaints were finalised. In 2005-06, 106 complaints were received under the ADA, 80 of which were finalised.
- 6.6 The age of complainants was as follows:
- 0 -14 years - 5
  - 5 - 24 years - 16
  - 25 -34 years - 5
  - 35 - 44 years - 7
  - 45 - 54 years - 43
  - 55 - 64 years - 44
  - more than 65 years - 29
  - unknown - 35
- 6.7 Age discrimination complaints were overwhelmingly received in the area of employment (73 per cent in 2004-05 and 74 per cent in 2005-06). Slightly less than one fifth of complaints were received in relation to the provision of goods,

services and facilities (18 and 14 per cent respectively) and less than 5 per cent in relation to superannuation and insurance, administration of commonwealth laws and programs, education, accommodation, and access to premises.

- 6.8 To date 86 per cent of age discrimination complaints received have been finalised. 25.5 per cent of the total complaints finalised have been resolved through conciliation, 15 per cent have been withdrawn and 25 per cent terminated by HREOC. The remainder were closed for administrative reasons such as the complainant had previously lodged a complaint with a state anti-discrimination agency or they were not an aggrieved party.
- 6.9 Of the 46 terminated complaints, eight were terminated because the alleged conduct was not found to be unlawful, 33 were trivial, vexatious, misconceived or lacking in substance and in five cases there was no reasonable prospect of conciliation. Of the sixteen complaints that were withdrawn, two were not pursued because they were settled outside the Commission and in 12 cases, the complainant advised the Commission that s/he did not wish to pursue the matter.
- 6.10 All complainants to HREOC, regardless of the alleged ground of discrimination, are also asked to complete an optional survey which requests a number of demographic details including the complainant's age. While a large number of complainants decline to give details of their age, a significant number do, which allows HREOC to further develop our understanding of discrimination facing older people. Of all complaints received between 1 July 2004 and 30 June 2006, 2002 complainants informed HREOC of their age, which is a total of 76 per cent of complainants. Almost 10 per cent of these complainants were aged between 55 and 64 and four per cent were aged 64 years and over.
- 6.11 Of people aged over 55 who made complaints to HREOC, the largest percentage made complaints of age discrimination (51 per cent of all complainants under the ADA for whom age is recorded). This compares to 18 per cent of complainants under HREOCA, 15 per under the DDA, 13 per cent under the RDA and three per cent under the SDA.
- 6.12 In 2004-05 17 per cent of complaints made under the Age Discrimination Act were made by people born outside Australia as were 32 per cent in 2005-06.
- 6.13 Eight per cent of complainants under the Age Discrimination Act identified as Aboriginal in 2004-05. There were no Torres Strait Islander complainants in 2004-05 and no Aboriginal or Torres Strait Islander complainants in 2005-06.

## **Complaints of age discrimination under State and Territory legislation**

- 6.14 In addition to the ADA, each State and Territory jurisdiction has legislation which prohibits discrimination against individuals and groups of people on the basis of age.

- 6.15 The legislative framework in each of the States and Territories for the purposes of complaints, consists of a single anti-discrimination Act which proscribed various grounds or attributes on which a person must not be discriminated against. These laws are: *ACT Discrimination Act 1991*; *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (QLD); *Anti-Discrimination Act 1998* (TAS); *Equal Opportunity Act 1977* (Vic); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1985* (WA); and *Anti-Discrimination Act 1992* (NT).
- 6.16 The number of complaints of age discrimination lodged across State and Territory agencies in Australia during the last three years is as follows:<sup>19</sup>

Year	ACT	NSW	QLD	SA	TAS	VIC	WA	NT
2005-06	16	N/A	N/A	N/A	35	112	17	14
2004-05	14	51	69	15	27	147	35	12
2003-04	10	84	79	8	82	192	39	17

- 6.17 On the most recently available figures, this represents the following percentage of total complaints in each jurisdiction: ACT- 6.6 per cent; NSW- 4.8 per cent; QLD – 6.2 per cent; SA 11 per cent; TAS – 5.1 per cent; VIC – 5.1; WA – 5.2 per cent; NT 7.8 per cent.

## Outcomes of age discrimination complaints

- 6.18 Complaints made under the ADA have a high rate of resolution through conciliation; 47 per cent of finalised complaints in 2004-05 and 34 per cent in 2005-06. Of all complaints received under the ADA, almost half went to conciliation. This compares favourably with complaints made under other HREOC legislation.
- 6.19 To date only one complaint of age discrimination under the ADA has been filed in the Federal Court of Australia. This complaint has not yet proceeded to hearing.

## Case studies – conciliated age discrimination complaints

- 6.20 *Complaint of age and disability discrimination in the area of goods and services:* Mr C is 81 years of age had been a member of the respondent golf club for over 50 years. Mr C has mobility disability due to his damaged knees and due to his age and disability, he uses a ride-on cart to play golf. Mr C advised that he and other users of ride-on buggies were charged \$250 being an additional fee to contribute towards the cost of repairing the golf course due to compaction caused by the use of private ride-on motorised/electric golf

<sup>19</sup> Figures have been sourced from respective State and Territory human rights agencies' annual reports. It should be noted that some agencies record complaints closed rather than complaints received in a financial year. Details of complaints lodged in Queensland and South Australia are not publicly available for 2003.



vehicles. Mr C claimed that the imposition of such a fee constitutes an act of direct and indirect discrimination on the basis of his age and disability because he cannot play golf without using a ride-on cart.

Following HREOC contacting the respondent, the club advised that the matter was considered by the Board and it was resolved to rescind the resolution to impose fees on all users of ride-on buggies and reinstated the former position to “exempt certain members who have previously provided medical evidence if the need to use such vehicles, or had demonstrated that they can only play with such assistance”. The Board also decided to refund all fees to members affected by the decision including Mr C.

- 6.21 *Complaint of age discrimination in area of insurance:* Ms P is a business owner and travels overseas regularly for her work. She claimed she has taken out yearly business travel insurance cover with YYY Insurance for the last three years. Having turned 70 in late 2002, in 2003 she received a letter from the insurance company stating that she could no longer take out yearly insurance and could only be covered as per their product brochure. There were restrictions also to taking out insurance only on a ‘trip by trip’ basis with further restrictions on the times he could stay overseas.

Ms P's travel agent assisted her to complain to the insurance company and she then complained directly by telephone to the company herself. She claims that she asked for ‘actuarial statistical’ information for the basis of their actions, to which the Insurance company replied that they did not have ‘those figures’ and that ‘we sent you a brochure and that was our offer which you accepted’. Ms P claimed that the new policy has caused her financial hardship – while she had previously paid \$450 per annum for insurance, she was required to pay \$420 for only a 30 day policy for a recent trip overseas. She claimed that as she had to travel frequently, her cover would be increased significantly because she is now 70 years of age. Ms P claimed this would also impact on future job opportunities as her small company has limited financial resources.

The matter was referred to conciliation following which a written apology was provided along with annual business travel insurance policy at no charge for the year. The resolution also included the ability for Ms P to purchase annual business insurance until she turns 75 years of age at a fixed price. The insurance company also agreed to look at the development of a new product covering frequent travellers which would be made available to people of all ages.

- 6.22 *Age discrimination in the area of employment:* The complainant Mr A is 70 years of age and was employed by the respondent as a sales representative for a medium size retail outlet. The complainant advised he was informed that the respondent would be restructuring and creating a new business unit. The complainant claims that it was implied that there may be some retrenchments as a result of the restructure.

After he was advised of the restructure he noticed an advertisement in the

newspaper for a similar position to the one that he occupied. Some time later he was made redundant. Mr A alleged that a younger employee who performed the same role in the same area as he did was invited to take up a position within the new structure but he was not afforded this opportunity.

The respondent advised that the object of its restructure was to create a team that was more effective and efficient by consolidating a number of tasks in one position. The respondent claimed that the complainant's role was eliminated in the restructure. In settlement of the complaint the respondent agreed to pay the complainant the sum of \$8500.00.

6.23 *Complaint of age and disability discrimination in the areas of the provision of goods, services and facilities and access to premises:* The complainant Ms B is 78 years of age and experiences a 'constellation of diseases which put her at an increased risk of falling'. She lodged complaints of age and disability discrimination against her local council. She claimed that due to building works in a nearby street, the cul-de-sac in which she lived was often blocked by trucks and other machinery and she had difficulties accessing the footpaths, cul-de-sac and her home. She alleges her complaints to the local council were not actioned and that she was harassed because of her age and disability by those working on the site.

The matter was resolved through conciliation with the local council. The respondent council agreed to provide to the complainant a statement of regret and to reimburse the complainant's costs of \$106.90 for photographs she had taken in support of her complaint; to invite the complainant to address the next meeting of the council's Access and Disability Committee on how building activity may impact on people with disabilities and the aged; to examine the impact of the respondent's development approval process on persons with disabilities and persons who are elderly and to confirm in writing to the complainant the procedures in place for the recording of complaints made to the council, both within six months of the agreement.

6.24 *Complaint of age discrimination in area of insurance:* Mr J is 61 years old and works as a sub contractor. Mr J claims he has had commercial business insurance with XXX Insurance Company for 10 years and has never made an illness claim. The insurer declined to renew his illness cover under the Personal Accident and Illness Section of the policy.' The insurer said it had always had an age cut off for the provision of illness cover and that this age limit is consistent with standard industry practice. When Mr J purchased business insurance from the company the provision of Personal Accident and Illness cover had an upper age limit of 65. The policy was reviewed in 1998 and a change was made to reflect an upper age limit of 60.

The matter was referred to conciliation and resolved on the basis that the insurer agreed to reinstate illness cover to Mr J's policy. The terms and conditions of the policy remained the same as the standard policy and allowed to continue until Mr J was 65 years of age, and the insurer would not require

payment of the relevant additional premium for illness cover.

- 6.25 *Complaint of age discrimination in area of employment:* Ms O is 69 years old and was employed as a solicitor in the respondent firm for nearly four years. She claimed to have received excellent performance reviews and that no issues were ever raised in relation to her performance. She stated that she had entered into a written employment contract which had expired at the time her employment was terminated.

Ms O stated that in December 2005 she had a meeting with her supervising partner and the managing partner during which she was informed that she did “not have a future with the Firm” and she was given one month notice of the termination of her employment. She alleges that she asked for a reason for terminating her employment but the partners refused to give her one. She claims that shortly prior to her employment being terminated the firm employed a new, younger solicitor whom she believes was hired to take her place. Ms O claimed that the managing partner had stated, on a number of occasions at staff gatherings, that he was committed to a younger firm. She also alleged that the managing partner would congratulate partners retiring for their willingness to “make way for youth.”

The firm stated that Ms O’s employment was not terminated on the grounds of performance or her age. The firm claimed that there was a restructuring of Ms O’s group and her role became redundant. The firm stated that they appointed an experienced practitioner to take over the management of the area that Ms O was working in and that the new appointment did not constitute a replacement of Ms O but was an entirely separate management role. The firm denied that Ms O’s age had any bearing on the cessation of her employment.

This complaint was terminated because there was no reasonable prospect of conciliation by HREOC and proceedings have been filed in the Federal Court of Australia.

- 6.26 *Complaint of age discrimination in employment (recruitment):* The complainant Mr B who is 55 years of age applied for a graduate information technology position with a large government department via a private employment agency. The complainant said that despite having worked for the department for over 10 years and having over 30 years relevant experience, his application was rejected. The complainant claimed that the employment agency told him that he should not be applying for graduate positions. The complainant alleged discrimination on the basis of his age.

The department denied discriminating against the complainant. The department said it was unaware of Mr B’s application as it only became involved in the recruitment process once candidates were shortlisted by the employment agency and Mr B has not reached that stage of the process. The employment agency also denied discriminating against Mr B on the basis of his age and said that data in relation to an applicant’s age or age group is not considered relevant. The applicant claimed that Mr B’s application for the

graduate position was rejected because of a mistaken belief that he was employed by the department at the time of his application.

The complaint was resolved through conciliation with the employment agency agreeing to pay Mr B \$2000 in general damages and contribute \$4500 towards the expenses he had accrued in relation to the complaint.

## **Community awareness and concerns about age discrimination**

6.27 In addition to complaints received to date, HREOC has also recently commissioned a qualitative research project examining community awareness about age discrimination.<sup>20</sup> This research is as yet unpublished and was carried out for HREOC as a baseline study for upcoming community education and awareness campaign work in relation to the ADA.

6.28 The key findings of the research are:

- Age discrimination is prevalent in Australia with both literature and qualitative research finding widespread reports of discrimination.
- The experience of age discrimination generates enormous personal distress. Older people frequently feel demeaned, rejected or ignored on the basis of age.
- The researchers comment that research in the United Kingdom estimated the cost of age discrimination to the UK at 30 billions pounds a year and estimated that ageist stereotyping was responsible for a million people over 50 years remaining unemployed. Translated to Australia, this would equate to a cost \$A25 billion p.a. and 300,000 people unemployed.
- There are considerable barriers to preventing age discrimination. Prejudicial stereotypes about older people form a significant part of this problem.
- On its own, the Age Discrimination Act is limited in its effectiveness in preventing age discrimination in the community.
- There was little awareness among employers of the benefits of recruiting older people, such as higher productivity, lower recruitment costs and higher retention rates.
- Some employers and recruiters seemed to be able to find ways of avoiding discriminatory actions under the Act. Recruitment agencies were found to be a significant problem, because they had a commercial incentive to place younger workers (who move on more

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<sup>20</sup> Mark McGrath, Gerald Frape and Sean Kidney *Qualitative Research on Age Discrimination* prepared for the Human Rights and Equal Opportunity Commission Social Change Media December 2006: Unpublished

frequently and thereby create more revenue opportunities for recruiters who refill the positions) and because they tend to assume employers prefer younger workers.

- A review of media coverage of age discrimination and related issues indicated that media columnists are generally highly supportive of addressing age discrimination issues.
- A number of European and North American countries are engaging in campaigns to tackle age discrimination. There are very few reported examples of successful campaigns. One notable campaign was conducted in Finland, which took a broad educative approach to ageing in the workplace, with age discrimination being one of several issues addressed.
- Widespread reports of age discrimination are not commensurate with the small number of complaints registered by anti-discrimination agencies.
- People could not readily differentiate between state and federal agencies roles in relation to age discrimination complaints and some people felt that information about age discrimination could be better targeted to more effectively encourage complaints
- Most people were wary of making a complaint. They were concerned that relying on complaints based processes could reinforce images of them as 'whingers'.
- Older people wanted public education that was positive about their contribution and role and were concerned that campaigns focusing on solely the complaints process could have a negative impact.
- Researchers suggested that taking a multi-faceted approach to age discrimination and discouraging prejudicial stereotyping would be the most effective approach to addressing discrimination against older people. It was suggested that this type of campaign should incorporate: debunking myths, promoting the benefits of employing older people and introducing a range of policies designed to promote improved workforce participation by older people.

6.29 This information reinforces the importance of the government undertaking a multifaceted approach to combat age discrimination which includes not only information about the complaints processes but also community education about age discrimination legislation. Educative campaigns should aim to facilitate wider cultural changes to increase respect for the contribution of older people to the economy and society in general and include broader responses.

## 7 Improving protection under discrimination law for older people

7.1 In a submission to the Senate Legal and Constitutional Legislation Committee on the Age Discrimination Bill 2003, HREOC identified five issues where it believed the capacity of the legislation to protect older people from discrimination could be improved.<sup>21</sup> The five issues are as follows:

- **Dominant reason test [section 16]** - HREOC opposed the introduction of a dominant reason test into the new legislation and was of the view that the legislation should reflect 'the act done for 2 or more reasons' provisions contained in other federal anti-discrimination legislation. The RDA, SDA and DDA provide that where an act that is done for one or more reasons and one of the reasons is respectively because of the race, sex, or disability of a person, whether or not it is the dominant or substantial reason, then for the purpose of the law the act is taken to be done for that reason. HREOC was concerned that a dominant reason test would make it harder for people to make successful complaints as an act will only be taken to be done on the basis of the age of a person if their age is the dominant reason for doing an act. It was also of concern that due to the different test applied, age discrimination may not be considered to be as important as race, sex or disability discrimination which could undermine the positive benefits contained in the legislation. The Commission also noted that the dominant reason test was removed from the RDA in 1990 as a result of concerns about the practical application of the dominant reason test.
- **Exemption relating to direct compliance with laws, orders [section 39]** including Australian Defence Force - HREOC did not consider that defence force legislation and its subsidiary instruments (listed as a schedule to the Bill) should be specifically exempt from the proposed law, except so far as it related to the minimum age for enlistment and cadet schemes. HREOC considered that the inherent requirements provisions should be the appropriate exception for any of the current age based criterion used by the defence forces including those for entry for particular positions, transfer, promotion and retirement.
- **Extension of age discrimination to include relatives and associates**  
The prohibition of discrimination against relatives and associates has been an aspect of federal anti-discrimination law since 1975 and such provisions were included in the most recent piece of federal anti-discrimination law, the DDA. The inclusion of protections in the legislation

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<sup>21</sup> HREOC *Submission of the Human Rights and Equal Opportunity Commission to the Senate Legal and Constitutional Legislation Committee on the Age Discrimination Bill 2003* HREOC Sydney: this document can be found at [www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/age03/submissions/sub09.doc](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/age03/submissions/sub09.doc)

for associates and relatives in both the DDA and RDA has been largely uncontroversial and has not resulted in a large number of complaints being made on this basis and as such HREOC supported the extension of age discrimination protections being available to relatives and associates (that is principally carers) of older people.

- The issue of extending protections to relatives and carers of older people is one that continues to be increasingly important given Australia's ageing population and the large number of people, particularly women, providing informal care to older relatives and friends.
- **Exemption in relation to religious bodies [section 35].** HREOC considered that an exemption in relation to religious bodies, if it was ultimately considered necessary, should only apply where it was necessary to avoid injury to the religious susceptibilities of adherents to the religion.<sup>22</sup> However, the ADA as enacted, also permits discrimination by religious bodies where an act or practice of that body "conforms to the doctrines, tenets or beliefs of that religion", unlike the RDA and the DDA.<sup>23</sup>
- **Exemption in relation to voluntary bodies [section 36].** Like religious exemptions, such exemptions are not included in the RDA or the DDA. In addition, such an exemption is included in only two pieces of State anti discrimination legislation. HREOC has found that the inclusion of such an exemption in the SDA limits the ability of people to make complaints of alleged acts unlawful discrimination in an important area of public life.<sup>24</sup> The ADA permits discrimination against a person on the ground of their age both in connection with the admission of a person as a member of a body and in the provision of benefits, facilities and services to members of that body.<sup>25</sup>

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<sup>22</sup> HREOC *Response to Information Paper Proposals for Commonwealth Age Discrimination Legislation* December 2002 HREOC Sydney February 2003: this document can be found at [www.humanrights.gov.au/legal/age\\_discrimination\\_legislation.html](http://www.humanrights.gov.au/legal/age_discrimination_legislation.html)

<sup>23</sup> Section 35

<sup>24</sup> HREOC *Response to Information Paper Proposals for Commonwealth Age Discrimination Legislation* December 2002 HREOC Sydney February 2003: this document can be found at [www.humanrights.gov.au/legal/age\\_discrimination\\_legislation.html](http://www.humanrights.gov.au/legal/age_discrimination_legislation.html)

<sup>25</sup> Section 36

## 8 Fraud

- 8.1 Fraud can be broadly defined as “obtaining something of value or avoiding an obligation by means of deception”.<sup>26</sup>
- 8.2 The Australian Institute of Criminology (AIC) has identified the incidence of fraud against older people as quite low, however, it is a bigger problem for older people than any other type of personal crime. In 2002 an AIC survey found that people aged 65 years and over were more than half as likely to experience consumer fraud than people aged 16 - 64 years of age, irrespective of gender. Analysis of people aged 65 years and over has found that fraud occurs more than twice as often as assault and theft and 13 times more often than robbery.<sup>27</sup>
- 8.3 There is a distinct lack of national data about people’s experiences of fraud and what data there is has often not been analysed in terms of age of the victim. The small amount of research that is available has been compiled from surveys that aimed to identify only the last experience of fraud an older person has experienced, such as that conducted by the AIC above. This means that the actual prevalence of fraud against older Australians remains unknown.
- 8.4 Furthermore, surveys have commonly been limited to older people’s experiences of consumer fraud, overlooking the fact that there are three types of fraud commonly experienced by older people – consumer fraud, financial fraud and identity fraud.<sup>28</sup>
- 8.5 The AIC highlight that risks of crime, including fraud, for older people are not uniform. As is the case for all people, risks are higher in some geographic areas than others. Those who are more economically disadvantaged are generally more at risk, partly because they tend to live in higher-crime areas.
- 8.6 Fraud is an area of growing concern because it is frequently under-reported. The AIC has highlighted that only 35 per cent of all victims reported the incident to either the police or another agency. One of the barriers for people reporting incidents of fraud is perceived to be experience in dealing with the legal process.<sup>29</sup>
- 8.7 The main ways in which fraud is perpetrated include:

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<sup>26</sup> Grace Duffield and Peter Grabosky *The psychology of fraud* Australian Institute of Criminology 2001 Canberra, p1.

<sup>27</sup> Glenn Muscat, Marianne James and Adam Graycar Trends and Issues in crime and criminal justice No 220, *Older people and consumer fraud* Australian Institute of Criminology 2002 Canberra p2f.

<sup>28</sup> *National Seniors seeks crime fighters against fraud* Joint media release by National Seniors, Australian Government Department of Health and Ageing and the University of the Sunshine Coast Wednesday 12 April 2006.

<sup>29</sup> Glenn Muscat, Marianne James and Adam Graycar Trends and Issues in crime and criminal justice No 220, *Older people and consumer fraud* Australian Institute of Criminology 2002 Canberra p3.



- Taking money in advance for something where there is no intention to supply the goods or services;
- Supplying goods or services of a lower quality than what was paid for or not supplying the goods or services;
- Pressuring a person into buying something they really don't want through pressure selling techniques; and
- Using an identity disguise in order to carry out fraudulent activities.<sup>30</sup>

8.8 Some people experience a disproportionate amount of victimisation and this is similar for older people. The best predictor of victimisation is previous victimisation. Repeat victimisation has clear implications for crime prevention if known victims can be assisted in ways that reduce their risks. Existing surveys demonstrate that older people who have previously been a victim of another personal crime – in particular robbery, personal theft or assault - are three and a half times more likely to also become a victim of fraud when compared to people who have no previous experience of personal crime.<sup>31</sup>

8.9 More than one third of all older people surveyed reported that their last fraudulent experience involved door-to-door selling and a further one in five people reported telephone sales and mail order purchases. Slightly lower but still accounting for more than 10 per cent of respondents were television sales and telemarketing. When compared with people aged between 16 and 64 years, older people are less likely to experience fraud relating to car sales and building, construction or repair work.<sup>32</sup>

8.10 HREOC would encourage the Government to request the AIC to undertake a detailed study of fraud against older people which considers consumer, financial and identity fraud and which considers all experiences of fraud for those over the age of 65 and 55 for Indigenous people.

8.11 HREOC would further encourage the Government to request the Ministerial Council on Consumer Affairs undertake a review of regulation in relation to direct marketing, door-to-door sales and telemarketing to ensure comprehensive national standards are in place for 'cooling off' periods in these types of sales.

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<sup>30</sup> Glenn Muscat, Marianne James and Adam Graycar Trends and Issues in crime and criminal justice No 220, *Older people and consumer fraud* Australian Institute of Criminology 2002 Canberra p1.

<sup>31</sup> *Ibid*, p4.

<sup>32</sup> *Ibid*, p5.

## 9 Financial Abuse

- 9.1 Financial abuse against older people has been defined by the World Health Organisation as “the illegal or improper exploitation or use of funds or resources of the older person”.<sup>33</sup> This is one of a number of definitions currently used.
- 9.2 Financial abuse includes deliberate abuse, undue influence, misuse of Enduring Power of Attorney (whether deliberate or inadvertent), withholding money, not repaying loans, not recognising financial contributions and using possessions without permission.<sup>34</sup>
- 9.3 Examples of financial abuse include:
- Taking, misusing or using, withholding knowledge about or permission in regard to money or property
  - Forging or forcing an older person’s signature
  - Abusing joint signatory authority on a blank form
  - Misusing ATMs and credit cards
  - Cashing an older person’s cheque without permission or authorisation
  - Misappropriating funds from a pension
  - Getting an older person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence
  - Persuading an older person to change a will or insurance policy to alter who benefits from the will or policy
  - Promising long-term or lifetime care in exchange for money and property and not providing such care
  - Over-charging or not delivering care giving services
  - Getting an older person to go guarantor without sufficient knowledge to make an informed decision<sup>35</sup>

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<sup>33</sup> World Health Organisation (WHO) *Family violence 2002* WHO Geneva cited in Office of Senior Victorians Elder Abuse Prevention Project *The mismanagement and misappropriation of older people’s assets: How can the financial service sector help?* A roundtable discussion, November 2005 p2.

<sup>34</sup> Cheryl Tilse *Financial abuse of older people: Building knowledge from recent Australian research* Presentation for ARAS Conference 15 June 2006.

<sup>35</sup> Thomas Hafemeister “Financial Abuse of the Elderly in Domestic Settings” in Richard J. Bonnie and Robert B. Wallace (Eds) *Elder Mistreatment: abuse, neglect and exploitation in an ageing America* National Academies Press 2003 Washington.

- 9.4 The NSW Law and Justice Foundation study<sup>36</sup> considered financial abuse in respect of inadequate treatment by financial institutions and in relation to powers of attorney and family agreements. Older people raised a range of concerns about financial abuse in particular concerns that
- an attorney may be appointed as a result of a false representation of incapacity or guardianship processes may incorrectly assess capacity
  - an attorney may improperly take a benefit for him/herself or a third party
  - guardianship tribunals processes may result in delays, fees or mismanagement
  - there is no automatic right of representation before guardianship tribunals
  - there is a lack of accessible review arrangements to challenge guardianship orders with complainants required to lodge formal appeals with bodies such as a formal administrative decisions tribunal or court.
- 9.5 The existence of multiple definitions of elder abuse, of which financial abuse is one type, has made it difficult to get accurate figures on the prevalence of the financial abuse of older people with estimates ranging from between one and five per cent.<sup>37</sup>
- 9.6 Figures are not available on the precise prevalence of financial abuse however evidence based upon ‘help lines’ in Victoria and Queensland estimate financial abuse accounts for 50 per cent of all calls. An Aged Care Assessment Team (ACAT) study conducted on the Central Coast of NSW in 1999 found that financial abuse accounted for 44 per cent of the 72 abuse cases researched. This study found that 50 per cent of older people were abused by their children, six per cent by spouse and the remaining 44 per cent by ‘others’. The Elder Abuse Prevention Unit in Queensland is one of the more developed services in Australia – over a seven month period the service received 59 calls with regard to the suspected abuse of \$8.2 million.<sup>38</sup>
- 9.7 The presence of dementia or other cognitive impairment can lead to difficulty in understanding and carrying out financial transactions. People without family or

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<sup>36</sup> Sarah Ellison, Louis Schetzer, Joanna Mullins, Julia Perry and Katrina Wong *Access to Justice and Legal Needs Volume 1 The Legal Needs of Older People in NSW* Law and Justice Foundation of NSW December 2004

<sup>37</sup> *Ibid*, p281.

<sup>38</sup> Office of Senior Victorians Elder Abuse Prevention Project *The mismanagement and misappropriation of older people’s assets: How can the financial service sector help?* A roundtable discussion November 2005 p4.

someone else they implicitly trust may be more likely to experience financial abuse.<sup>39</sup>

- 9.8 A number of studies have indicated that high levels of reports of financial abuse towards older people are not substantiated when investigated. An American study undertaken in 1996 found that less than half of the reports received by an Adult Protection Service were substantiated.<sup>40</sup>
- 9.9 Older people's experience with financial abuse is not limited to acts undertaken by strangers but may also be by people appointed under a power of attorney, a service provider, a friend or family member. It has been estimated that close relatives account for around 80 per cent of the financial abusers of older people. Many family members act in the belief that they are (or should be) entitled to inherit and that they are only bringing forward the time at which they receive the inheritance.<sup>41</sup>
- 9.10 One particular circumstance that frequently arises is the situation of an older person being asked to guarantee the loans of younger relatives. Such a situation has a lot in common with the issue of 'sexually transmitted debt' between couples which has received some attention in recent years.
- 9.11 Experts have argued that older Australian are particularly susceptible to being persuaded to act as guarantors against their better judgement and that the consequences of having to honour that guarantee are much harsher for older than younger people.<sup>42</sup>
- 9.12 Some experts have suggested that contract law does not adequately deal with problems of older people being pressured into acting as guarantors in relation the debts of family members. While these concerns exist, this must be balanced against the need and desire of older people to assist family members in relation to financial matters. HREOC would be supportive of Government moves to investigate providing further statutory protections to older people in relation to acting as guarantors for the debts of family members and particularly in relation to the use of the family home as security for the debts of a third party.
- 9.13 A national telephone survey carried out in 2002<sup>43</sup> found that non-professional financial assistance is required by people aged 65 years and over for a number of reasons. 'Lack of confidence' was felt by more than 28 per cent of the 3466

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<sup>39</sup> Office of Senior Victorians Elder Abuse Prevention Project *The mismanagement and misappropriation of older people's assets: How can the financial service sector help?* A roundtable discussion November 2005 p6.

<sup>40</sup> *Ibid*, p7.

<sup>41</sup> Julian Gardner *Uncovering elder abuse: powers of attorney, administration orders and other issues for banks* Presentation to the Banking and Financial Services Ombudsman Annual Conference 25 November 2005 Victorian Office of the Public Advocate p3.

<sup>42</sup> Juliet Lucy Cummins "Relationship Debt and the Aged: Welfare vs Commerce in the law of guarantees" in *Alternative Law Journal* Vol 27 No 2 April 2002 pp63-67 p63

<sup>43</sup> Cheryl Tilse, Deborah Setterlund, Jill Wilson and Linda Rosenman *Ageing and Society* 25 2005 pp215-227 cited in Julian Gardner *Uncovering elder abuse: powers of attorney, administration orders and other issues for banks* Presentation to the Banking and Financial Services Ombudsman Annual Conference 25 November 2005 Victorian Office of the Public Advocate p2.

respondents, followed by 'disability or poor health' (27 per cent) and 'old and frail' (20 per cent). Nearly 12 per cent required assistance due to 'dementia or confusion' and almost six per cent because 'English was not their first language'. Looking only at respondents who were aged 80 years or more saw dementia being a more common reason, as well as an increase to 32 per cent for those who cited 'old and frail' as the reason they required financial assistance.

- 9.14 The 2002 survey<sup>44</sup> also found that paperwork was the task with which more older people required assistance (72 per cent), followed by paying bills (55 per cent), accessing money or banking (42 per cent), pensions and superannuation (37 per cent), property management (31 per cent), accessing financial advice (16 per cent) and investments (11 per cent).
- 9.15 The survey<sup>45</sup> (see previous two points) also found that whilst older people do receive formal and semi-formal assistance there are large numbers of older people who rely on informal financial arrangements. 15 per cent were found to have an enduring power of attorney, 1 per cent an administration order and 19 per cent a semi-formal bank arrangement. Almost 50 per cent of respondents needed assistance to pay with their own money, 17 per cent to fill in a cheque or make a withdrawal, over 10 per cent to make an electronic payment (via phone or internet) and almost 10 per cent had given their ATM PIN to another person.
- 9.16 The high number of older Indigenous people living with family has particular implications for these older people.<sup>46</sup> While on the positive side, older Indigenous people may not have to survive independently which can have financial benefits for both these individuals and their households, especially as aged adults are often in receipt of reliable sources of pension income and provide child-care and stability to household membership. However, there may also be economic disadvantages to these social arrangements with many Indigenous households being overly dependent on kin with low welfare-based incomes. These welfare recipients may, in turn, be under substantial economic pressure from other adults and children who are dependent upon their incomes.<sup>47</sup>

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<sup>44</sup> Cheryl Tilse, Deborah Setterlund, Jill Wilson and Linda Rosenman Ageing and Society 25 2005 pp215-227 cited in Julian Gardner *Uncovering elder abuse: powers of attorney, administration orders and other issues for banks* Presentation to the Banking and Financial Services Ombudsman Annual Conference 25 November 2005 Victorian Office of the Public Advocate p3.

<sup>45</sup> Ibid, p3.

<sup>46</sup> See 3.9.4

<sup>47</sup> Boyd Hunter, Steven Kennedy and Daniel Smith *Sensitivity of Australian income distributions to choice of equivalence scale: Exploring some parameters of Indigenous incomes* CAEPR Working Paper No. 11/2001 Centre for Aboriginal Economic Policy Research, ANU

## 10 Enduring Powers of Attorney and Guardians

- 10.1 A Power of Attorney is a legally-binding document that allows a person (the donor) to nominate someone they trust (the donee) to make certain specified financial decisions on their behalf. The donor is still able to make their own decisions and control their finances, leaving the donee only to do those tasks they have been authorised to do. The Power of Attorney may be time-limited, until death or until the donor can no longer make their own decisions (mentally incapacitated).<sup>48</sup>
- 10.2 Each of the States and Territories have also enacted legislation that allows administrative boards or statutory officers to appoint substitute decision makers for people in relation to personal/ lifestyle matters and financial matters. In relation to health care issues, most States and Territories also include in the relevant legislation a 'hierarchy' of people in an individual's life who are able to consent to certain health related decisions if that person is incapable of doing so, without the need of any other legal instrument or decision.
- 10.3 The 'enduring' nature of legal instruments in relation to enduring powers of attorney and enduring guardians means that the appointment remains valid despite the subsequent incapacity of the person making the appointment.<sup>49</sup> Legislation has been enacted in most States and Territories that allow people to enter into enduring powers of attorney and appoint enduring guardians.<sup>50</sup>
- 10.4 These legislative measures are seen as part of the general trend to allow individuals to act proactively before there is any impairment of capacity in relation to decision making. It provides individuals with the ability to plan ahead and make decisions about who they wish to appoint to manage their affairs, either financial or personal, rather than having an independent body make these decisions for them.
- 10.5 In very brief summary, the legislative frameworks around Australia for the appointment of guardians and the execution of powers of attorney are as follows:

### Financial matters

- 10.6 Each State and Territory of Australia permits the execution of enduring powers of attorney.<sup>51</sup>
- 10.7 It appears there is no automatic process to review the operation of enduring powers of attorney and actions taken pursuant to them.

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<sup>48</sup> Legal Services Commission of South Australia, Power of Attorney pamphlet, September 2006.

<sup>49</sup> This can be compared with a general power of attorney in which the authority given to the attorney by a principal terminates upon the loss of mental capacity of the donor.

<sup>50</sup> It is noted that different terminology is used in different jurisdictions.

<sup>51</sup> *Guardianship and Administration Act 1990* (WA) Part 9; *Powers of Attorney Act 1980* (NT) Part III; *Powers of Attorney Act 1956* (ACT) s 12; *Powers of Attorney Act 2003* (NSW) Part 4; *Powers of Attorney Act 1998* (Qld) Chapter 3 Part 2; *Powers of Attorney Act 2000* (Tas) Part 4; *Instruments Act 1958* (Vic) Part XIA; *Powers of Attorney and Agency Act 1984* (SA).

- 10.8 A review of the suitability of an individual/s appointed as the attorney under an enduring power of attorney can be sought, usually by the individual who made the appointment, a person concerned for the welfare of the person who made the appointment, or on the own motion of the relevant administrative body. Such a review may be sought, for example, where there are allegations made about abuse of power by the attorney in relation to financial matters. This review is normally undertaken by the relevant administrative body in each State and Territory.
- 10.9 The operation of an enduring power of attorney will also be suspended if an administrative body, such as the NSW Guardianship Tribunal, makes a financial management order in relation to the individual subsequent to the execution of the enduring power of attorney.<sup>52</sup>
- 10.10 While there are no automatic review periods provided for the legislation and reviews are not conducted by the Tribunal as a matter of course (unless it is requested), the NSW Protective Commissioner has the power under the Protected Estates Act 1983 (NSW) to authorise and direct the actions of private financial managers<sup>53</sup> and therefore, some level of oversight is provided.<sup>54</sup>

## **Personal/ lifestyle matters**

- 10.11 The Northern Territory and Western Australia do not currently have legislation that allows individuals to appoint enduring guardians to make decisions about personal/lifestyle matters.
- 10.12 The remaining States and Territories do make provision for the delegation of decision making in relation to personal/ lifestyle matters. Two different approaches are taken, but it appears that the outcome is largely the same.
- 10.13 Legislation in New South Wales,<sup>55</sup> South Australia,<sup>56</sup> Tasmania<sup>57</sup> and Victoria<sup>58</sup> authorises an adult to appoint an 'enduring guardian'. For example, in NSW, the Guardianship Act 1987 (NSW) empowers the enduring guardian to make decisions about the following matters:
- deciding the place (such as a specific nursing home, or the appointor's own home) in which the appointor is to live,
  - deciding the health care that the appointor is to receive,
  - deciding the other kinds of personal services that the appointor is to receive,

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<sup>52</sup> *Protected Estates Act 1983* (NSW) s 76(5). I have not had an opportunity to investigate whether a similar situation exists in the other States and Territories.

<sup>53</sup> *Protected Estates Act 1983* (NSW) s 30.

<sup>54</sup> This paper does not consider where a similar situation may exist in the other States and Territories.

<sup>55</sup> *Guardianship Act 1987* (NSW) Part 2.

<sup>56</sup> *Guardianship and Administration Act 1993* (SA) Part 3.

<sup>57</sup> *Guardianship and Administration Act 1995* (Tas) Part 5.

<sup>58</sup> *Guardianship and Administration Act 1986* (Vic) Part 4 Division 5A.

- giving consent under to the carrying out of medical or dental treatment on the appointor,
- any other function relating to the appointor's person that is specified in the instrument.

10.14 In Queensland<sup>59</sup> and the ACT,<sup>60</sup> the power to delegate decision making in relation to personal matters is contained within their respective powers of attorney legislation and the individual appointed is referred to as an 'attorney'. The Queensland legislation provides examples of the kinds of matters that are personal matters as follows<sup>61</sup> (a similar list is provided in the ACT legislation):

- Where the person lives
- With whom the person lives
- Whether the person works and, if so, the kind and place of work and the employer
- What education or training the person undertakes
- Whether the person applies for a licence or permit
- Day-to-day issues, including, for example, diet and dress
- Whether to consent to a forensic examination of the person
- Health care of the person
- A legal matter not relating to the person's financial or property matters

10.15 In addition to the power to delegate decision making in relation to personal matters, a number of jurisdictions have also introduced the concept of an 'advance health directive' or its equivalent. In Queensland, for example, power of attorney legislation also allows a principal make an 'advance health directive'.<sup>62</sup> In executing an advance health directive, the principal may give directions about health matters and special health matters for their future health care, and may appoint one or more people as attorneys to exercise power for a health matter for the principal in the event that the directions prove to be inadequate.

10.16 To give some indication of the numbers of individuals these issues affect, a national telephone survey of 3466 people found that 15 per cent had an enduring power of attorney.<sup>63</sup>

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<sup>59</sup> *Powers of Attorney Act 1998* (Qld) Chapter 3 Part 2.

<sup>60</sup> *Powers of Attorney Act 1956* (ACT) s 13. Note that the Powers of Attorney Bill 2006 has been introduced into the ACT Legislative Assembly and, if passed, will repeal the 1956 Act.

<sup>61</sup> *Powers of Attorney Act 1998* (Qld) Schedule 2 Part 2.

<sup>62</sup> *Powers of Attorney Act 1998* (Qld) Chapter 3 Part 3.

<sup>63</sup> Cheryl Tilse, Deborah Setterlund, Jill Wilson and Linda Rosenman *Ageing and Society* 25



- 10.17 Without providing details for all states and territories, an examination of NSW alone, shows that the NSW Guardianship Tribunal received 2153 applications (43 per cent of all new applications) for a financial manager in 2004-05. In 2004-05 there were 70 applications for enduring power of attorney.<sup>64</sup>
- 10.18 Dementia was the primary cause for applications to the NSW Guardianship Tribunal for financial management orders (40per cent of the applications were made for this reason). Mental illness (17per cent) and intellectual disability (15per cent) were the next main reasons applications were made for financial orders in 2004-05.<sup>65</sup> 51 per cent of applications for new orders received by the NSW Guardianship Tribunal came from women. Women (57 per cent) also had more applications than men (43 per cent) in the 65 years and over age group. In relation to orders made for people aged less than 65 years of age, men accounted for 59 per cent of orders.<sup>66</sup>
- 10.19 The NSW Public Trustee was appointed as attorney for 1428 people in 2004-05 and 169 people asked them to actively manage all or part of their financial affairs.<sup>67</sup>
- 10.20 The NSW Office of the Protective Commissioner (OPC) managed the affairs of 8235 people in 2004-05. A further 1873 people had a private manager appointed by the OPC in 2004-05. In 2004-05 psychiatric disability was the largest reason for clients to have their affairs managed by the OPC (45 per cent of all clients), followed by developmental disability (20 per cent) and dementia (16 per cent). Information is not available on the age of all clients.<sup>68</sup>
- 10.21 HREOC would encourage State and Territory governments to audit their respective processes for review of guardianship and power of attorney appointments and decisions to ensure greater protections of older people where decisions are taken on their behalf.

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2005 pp215-227 cited in Julian Gardner *Uncovering elder abuse: powers of attorney, administration orders and other issues for banks* Presentation to the Banking and Financial Services Ombudsman Annual Conference 25 November 2005 Victorian Office of the Public Advocate p10.

<sup>64</sup> NSW Guardianship Tribunal Annual Report, 2004/2005, p17f.

<sup>65</sup> *Ibid*, p19.

<sup>66</sup> *Ibid*, p20.

<sup>67</sup> NSW Public Trustee Annual Report 2004/05, p3.

<sup>68</sup> Office of the Privacy Commissioner Annual Report 2004/05, p16f.

# 11 Family agreements

11.1 Family agreements, also known as ‘independent care agreements’, ‘personal services contracts’ or ‘lifetime care contracts’<sup>69</sup> usually involve accommodation arrangements and often entail the transfer of the older person’s property (usually the family home) to a friend or family member in return for promised care and support in the home.

11.2 Family agreements is a term for those agreements about such accommodation matters which are not formal, although sometimes written agreements are made with the assistance of a legal advocate and/or agreements may also be reflected in a person’s will.<sup>70</sup> However, in general family agreements are often nothing more than a vague and very general promise to take care of the other person for the rest of their life which have been made either verbally or in writing.<sup>71</sup>

11.3 A combination of factors have contributed to the existence of family agreements including:

- a general aversion to ‘institutional’ residential aged care
- limited access to residential aged care places
- a preference by older people and their families to remain in the community
- difficulties accessing community care
- the ageing population and an increased number of older people living with disabilities
- a desire by older people to preserve their assets, in particular the family home, for future generations and a consequent reluctance to sell the family home so as to pay an accommodation bond or similar for an aged care place or to pay for community based care
- a desire by older people to arrange their assets and incomes so as to maintain eligibility for social security benefits such as the Age Pension
- high levels of workforce participation and high debts (particularly mortgages) among adult children which may make it difficult for them

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<sup>69</sup> Brian Herd “The family agreement: a collision between love and the law?” in Australian Law Reform Commission *Reform* issue 81 Spring 2002 p23.

<sup>70</sup> See Rosslyn Munro “Family agreements: All with the best of intentions” in *Alternative Law Journal* Vol 27 No 2 April 2002 pp68-77 and Brian Herd “The Family Agreement Legal good sense or social bad taste for the aged” in *Alternative Law Journal* Vol 27 No 2 April 2002 pp72-77

<sup>71</sup> Margaret Hall *The Law Report* ABC Radio National 2 September 2003.

to give up their job or cut back their hours of work in order to carry out care for parents.<sup>72</sup>

- 11.4 A frequent scenario for a family agreement is as follows: an older person, Mrs Smith, has been living independently in a unit, alone since the death of her husband, and is beginning to become increasingly frail and needs assistance with some daily activities. She and her family now need to consider whether she should live in a residential aged care facility, receive community care or care from her family members. One of Mrs Smith's daughters proposes that Mrs Smith sell her unit and that her daughter and husband use part of the proceeds to build a granny flat on their home and provide the necessary daily care for her mother.
- 11.5 There is very little statistical or empirical evidence in Australia of the rate at which families are making these family agreements. 1996 Census showed that 20 per cent of people aged 65 years and over who lived in private dwellings did so with children, relatives or friends. With Australia's ageing population, it is reasonable to assume that the prevalence of family agreements will increase.<sup>73</sup>
- 11.6 Family agreements are made on the basis of a range of assumptions, in circumstances which clearly may change over time, as may the older person's capacity to enforce their wishes.
- 11.7 Some practitioners have suggested that there are a range of advantages in reducing family agreements to writing including:
- setting out an agreed transparent agenda for the family as a whole as well as the older person about the specifics of the care and financial arrangements
  - reducing suspicion and fear among other family members about inheritance issues
  - potentially resolving conflicts which have the potential to ruin family relationships
  - avoiding expensive and extended litigation between and older person and other family member/s
  - allowing the older person and their family to meet their wishes of not entering a residential aged care facility
  - providing some certainty in the event of significant life events such as marriage breakdown between an adult child and their spouse and

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<sup>72</sup> Brian Herd *The family agreement. A collision between love and the law?* Carne Reid Herd Lawyers, (no date), p2 and Brian Herd "The Family Agreement Legal good sense or social bad taste for the aged" in *Alternative Law Journal* Vol 27 No 2 April 2002 pp72-77

<sup>73</sup> Brian Herd *The family agreement. A collision between love and the law?* Carne Reid Herd Lawyers, (no date), p2.

- giving the older person peace of mind at a time of significant stress.<sup>74</sup>

11.8 However, whilst understanding the objective of written family agreements, it is frequently the case that the process of documenting the agreement may result in exactly those issues it seeks to avoid. This is particularly the case in relation to increasing conflict within families, suspicion and fear among family members and the likelihood of legal action.

11.9 HREOC is of the view that the use of written family agreements should further be considered by the Government.

11.10 This consideration may include the development of community education resources which can be made available to older people and their families. Consideration may also be given to legal education for practitioners about the use and operation of family agreements to ensure greater protection of vulnerable older people.

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<sup>74</sup> Brian Herd "The Family Agreement Legal good sense or social bad taste for the aged" in *Alternative Law Journal* Vol 27 No 2 April 2002 pp72-77 at p74-75

## 12 Barriers to older people accessing legal services

12.1 The issue of access to the law by older people has been extensively examined in recent work carried out by the Law and Justice Foundation of NSW.<sup>75</sup>

12.2 This report highlighted both general barriers for older people in accessing legal services and particular barriers in relation to specific groups of older people such as older people living in residential aged care facilities and retirement villages, older people with specific health issues, older people who have experienced abuse, difficulties with financial arrangements and fraud and issues concerning those older people who require substitute decision making.

12.3 The general barriers impacting on older people's access to legal services identified included:

- technological barriers, particularly for telephone and web based services
- a lack of awareness of where to obtain legal information and assistance
- a lack of appropriately communicated legal information
- the high cost of legal services
- a lack of interest by some legal practitioners in older clients
- potential conflict of interests when legal practitioners for older people are arranged by family members
- difficulties in accessing legal aid, including restrictive eligibility tests
- a lack of availability of legal aid for civil disputes
- lack of specialised legal services for older people, particularly in rural, regional and remote areas
- lack of resources in community legal centres to tailor their services to the needs of older people.

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<sup>75</sup> Sarah Ellison, Louis Schetzer, Joanna Mullins, Julia Perry and Katrina Wong *Access to Justice and Legal Needs Volume 1 The Legal Needs of Older People in NSW* Law and Justice Foundation of NSW December 2004

- 12.4 Older people also expressed a desire for legal information that was clear and readily accessible - preferably through face-to-face contact - and to deal with legal practitioners who provided explanations in simple terms, were friendly, courteous, inexpensive, expert in dealing with older people and do not require the older person to exercise a lot of 'self-help'.
- 12.5 Both legal service providers and older people expressed the view that there was a gap in service provision to older people, particularly to older people who could not afford private solicitors.
- 12.6 A range of specific issues relating to access to the law were identified in relation to accommodation for older people particularly in aged care and retirement facilities. These included:
- inadequate security of tenure including issues concerning retirement village mismanagement, investment risk and financial viability of operators
  - complex and confusing contractual and financial arrangements, particularly where an older person's property is transferred to an aged care facility, where there is return of bond money, and/or complex fee structures. Complexity also arises in relation to departure fees, refund of entry fees on departure, contract provisions, responsibility for damage to premises, and village rules in retirement villages
  - abuse and neglect within aged care facilities
  - inadequate access by residents to medical and care records
  - disputes over recurrent charges and fees for residents of retirement villages and residential parks
  - disputes over the entire range of tenancy and service provision issues for older people living in boarding and lodging houses who are largely unprotected by tenancy laws
  - long waiting lists for public housing, rigid eligibility criteria, delays in carrying out repairs, problems with neighbours and lease terminations
  - private tenancy issues similar to those experienced by other tenants including discrimination by real estate agents, lack of security of tenure in short term leases, lease terminations, unreasonable rent increases, landlords/agents excessively seeking access to premises, difficulties in getting repairs to premises.
- 12.7 Older people identified a range of difficulties in relation to legal advice about financial matters including a lack of legal advocates who were sufficiently familiar with the complexity of social security and veterans' affairs legislative frameworks, difficulties with the application of income and assets tests and

over payments and errors in payment of government income support payments.

12.8 Older people also felt they lacked access to appropriate advice to enable them to make sound investment decisions and particularly where they may be asked to guarantee other people's, particularly family members', loans.

12.9 The NSW report also examined issues concerning elder abuse, including financial abuse. This is clearly an issue which has a great deal of currency at the moment, given recent high profile reports of abuse of older people in residential aged care facilities. The report found that a range of barriers prevented older people and their relatives and carers from reporting abuse including:

- ignorance of services that could assist
- isolation of victims
- fear of retribution or further victimisation
- shame of being abused by people in a position of trust and a fear of jeopardising important relationships with relatives and carers and
- a lack of knowledge by health professionals as to appropriate responses to abuse allegations.

12.10 HREOC very much welcomes recent announcements by the federal Minister for Ageing Santo Santoro and his state and territory counterparts of the significant reforms which are being phased in to better protect residents of aged care facilities from sexual and physical abuse. HREOC considers these reforms to the Age Care Complaints Resolution Scheme, changes to the operation of the Aged Care Standards and Accreditation Agency, the introduction of background checks for staff and volunteers in aged care facilities, compulsory reporting of serious abuse, protection for whistleblowers and the introduction of a dedicated Aged Care Commissioner to be an important step in improving the human rights and dignity of a particularly vulnerable group of older people in the Australian community.

12.11 Perhaps one of the most significant barriers that older people face in accessing legal services is their reluctance to speak about issues they consider to be private or family business.

12.12 Many older Australians are reliant upon the abuser to take them places, undertake tasks for them, and often speak for them (where the older person does not speak English fluently). They may not be in any position to get themselves to a legal service without the assistance of the abuser. Significant barriers in accessing legal services for older people who are victims of abuse include:

- a fear of institutionalisation (which is often perceived to be the end result for older Australians who are being abused by their carer);

- the signs and symptoms of abuse may be confused with the normal process of ageing;
- a lack of knowledge in the general and professional communities about elder abuse and when legal intervention may be required;
- a lack of community awareness of what constitutes abuse.<sup>76</sup>

- 12.13 It is possible that a greater level of awareness in the community could reduce the prevalence of elder abuse and/or increase older people's awareness of their need to access legal services.<sup>77</sup>
- 12.14 It is estimated that close to 70 per cent of older people do not access legal services in instances of abuse because the situation is personal and individual and the older person may fear retribution from the abuser if they attempt to stop them. Despite this affecting the decisions made by older people, the primary reason many of them choose not to seek legal assistance is because they believe they have no-one to confide in and also because they believe that nothing would change anyway.<sup>78</sup>
- 12.15 A further barrier to seeking legal assistance in instances of abuse is that an older person may be unable to report a crime in a way that convinces police to investigate. Furthermore, there have been reported instances of older people needing to see a number of lawyers before they found one who took them seriously. The actions of lawyers are therefore very important in bringing about change for an older person who is experiencing a "private world of abuse".<sup>79</sup>
- 12.16 The financial situation of older women places them particularly at risk of not being able to access legal services. A recent study undertaken by the federal Government<sup>80</sup> highlighted that women, are often reliant only upon income support payments, such as the Age Pension and therefore lack the financial resources necessary to take legal action.<sup>81</sup>
- 12.17 Social isolation and neglect also prevent older people from accessing legal services. The same can be said for people who have had their pensions diverted from their bank account to another person's bank account (such as a carer).<sup>82</sup>
- 12.18 People from CALD backgrounds and Indigenous people who are not fluent in English may face additional barriers in accessing legal services. Translated information may not be available in their language and even if it is they may

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<sup>76</sup> David Cripps, Jenny Biven, Jane Northey and Phillip Rigger "Abuse of older people: Issues for lawyers" *Elder Law Review* Volume 1 No. 1 2002 pp14-19

<sup>77</sup> *Ibid*, pp14-19

<sup>78</sup> *Ibid*, pp14-19

<sup>79</sup> *Ibid*, pp14-19

<sup>80</sup> Australian Government Office for Women *Aspects of Retirement for Older Women* Commonwealth of Australia 2006. See also sections 3.4.6-3.4.8

<sup>81</sup> Margaret Small *Justice hijacked. Older women and the law* Women's Legal Services NSW 2004

<sup>82</sup> *Ibid*



not be literate. Particularly people who are in an abusive relationship with a family member may have particular difficulty in ascertaining their rights if they require the assistance of that family member to translate information for them.<sup>83</sup>

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<sup>83</sup> Margaret Small *Justice hijacked. Older women and the law* Women's Legal Services NSW 2004

## **13 Conclusion and Recommendations**

- 13.1 Information provided in this submission points to the need for community education and awareness raising in relation to the legal rights of older people and information campaigns to encourage older people to take action in relation to those rights. HREOC is currently in the early stages of a public awareness campaign focusing on older Australians and employment related discrimination. HREOC will inform the Government about this campaign as it proceeds.
- 13.2 In light of Australia's ageing population, there is a need to undertake greater efforts to encourage older people to remain in the paid workforce through such initiatives as promoting the financial and organisational benefits of older workers to employers.
- 13.3 HREOC urges the Government to again review the dominant reason test, the breadth and details of exemptions and the issue of coverage of 'relatives or associates' under the ADA.
- 13.4 HREOC thanks the Committee for the opportunity to make this submission. Any further queries in relation to the submission may be directed to the Acting Director of the Sex and Age Discrimination Unit Ms Rocky Clifford on (02) 9284-9831.

# Appendix 1: Statistical Snapshot of Older People in Australia

## Current number of older people and projections

- A1.1 Increased life expectancies, declining birth rates and migration levels have all contributed to the ageing of Australia's population, a phenomenon that has been well documented in recent years. The population is ageing both numerically (with an increase in the absolute number of people aged 65 years and over), and structurally (an increase in the proportion of people aged 65 years and over).
- A1.2 By Census night 2001 there were 2.4 million people aged 65 years and over (12.6 per cent of the population). Just over half (54 per cent) were aged 65 – 74 years, with a third (34.9 per cent) aged 75 – 84 years and the remaining 11.1 per cent were aged 85 years and over.
- A1.3 The profile of the older population significantly altered over the last century with the proportion of the Australian population aged 65 years and over increasing from 4.0 per cent of the population in 1901 to 12.6 per cent in 2001.<sup>1</sup>
- A1.4 The Australian Institute of Health and Welfare (AIHW) predicts further increases in numbers of people aged over 65, with record rates of growth predicted for the period 2011 to 2021.<sup>2</sup> By 2011, ABS projections indicate that almost 15 per cent of Australia's population will be aged 65 years and over, rising to around 19 per cent by 2021. Over 1 in 5 people (21.2 per cent) will be aged over 65 years by 2026, rising to more than one quarter of the population (26.3 per cent) by 2046.<sup>3</sup>
- A1.5 Between 1997 and 2051 the numbers of people aged between 45 and 64 will experience the largest growth – from four million in 1997 to 6 million in 2051.<sup>4</sup> However the very old – that is people aged 85 years and over – are also predicted to grow significantly in number from 1.4 per cent of the population in 2002 to at least 6 per cent in 2051 and 7 per cent in 2101.<sup>5</sup>

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<sup>1</sup> Australian Bureau of Statistics (ABS) *Census of population and housing: Ageing in Australia* Cat. No. 2048.0 2001 ABS: Canberra pp1f, 5.

<sup>2</sup> Australian Institute of Health and Welfare (AIHW) *Disability and ageing: Australian population patterns and implications*. AIHW Cat. No. DIS 19. 2000 Canberra: AIHW (Disability Series), p xvii.

<sup>3</sup> ABS *Australian Social Trends 2005* Population: National Summary table Cat. No. 4102.0 ABS: Canberra p2.

<sup>4</sup> AIHW *Disability and ageing: Australian population patterns and implications* AIHW Cat. No. DIS 19. 2000 Canberra: AIHW (Disability Series), p xviii.

<sup>5</sup> Talina Drabsch *Ageing in Australia* NSW Parliamentary Library Research Service Briefing paper no 12/04 2004 Parliament of Australia Canberra p2

A1.6 Just over 17 per cent of Australia's total population is aged 60 years and over. This is comparable to a number of similar nations, with Canada, New Zealand and the USA sharing almost identical age profiles for older people.<sup>6</sup>

### **Gender breakdown of older people**

A1.7 While there are around the same numbers of women and men in all age groups up to 64 years, after the age of 65 women significantly outnumber men. In 2001, there were only 79 men for every 100 women aged 65 years and this number decreases rapidly in all age groups, for people aged over 85 there were only 45 men for every 100 women.<sup>7</sup>

### **Living arrangements of older people**

A1.8 In 2003, of the 3.35 million people aged 60 years and over, 91 per cent lived in private dwellings.<sup>8</sup>

A1.9 Of the 9 per cent of people aged 60 years and over who lived in non-private dwellings, 55 per cent lived in care accommodation (hospitals, residential aged care facilities/nursing homes and aged care hostels) and 45 per cent lived in 'other non-private dwellings' (hostels, hotels, motels, educational and religious institutions, boarding houses, guest houses and self-care retirement village units).<sup>9</sup>

A1.10 In 2005, over 26 per cent of all people aged 65 years and over lived alone.<sup>10</sup>

A1.11 The vast majority of older people, whether living alone or with others, feel safe or very safe being at home on their own during the day.<sup>11</sup>

A1.12 The 2001 Census found that 64 per cent of Australians aged 65 years and over lived in large urban areas<sup>12</sup>. A further 24 per cent lived in smaller urban areas<sup>13</sup> whilst 10 per cent lived in rural areas. Compared with the population as a whole it was found that while a similar proportion lived in large urban areas, older people are more likely than the general population to live in smaller urban areas and less likely than the general population to live in rural areas. Furthermore, the likelihood that an older person will live in a large urban area increases with age. These proportions have remained relatively stable over the past 30 years.<sup>14</sup>

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<sup>6</sup> ABS *Australian Social Trends 2006*, Data Cube, Table 1: International comparisons: Population composition.

<sup>7</sup> ABS *Census of population and housing: Ageing in Australia 2001* Cat. No. 2048.0 ABS Canberra, p2.

<sup>8</sup> ABS *Disability ageing and carers: Summary of findings 2003* Cat. No. 4430.0, ABS Canberra, p8.

<sup>9</sup> *Ibid*, p8.

<sup>10</sup> ABS *Australian Social Trends 2006* Data cube, Table 1: Family and community: National summary.

<sup>11</sup> ABS *Crime and Safety, Australia: Summary of findings 2005* Cat. No. 4509.0 ABS Canberra p9.

<sup>12</sup> That is with a population of 100,000 people or more

<sup>13</sup> That is with a population between 1000 and 99,999 people

<sup>14</sup> Australian Bureau of Statistics (ABS) 2001 *Census of population and housing: Ageing in Australia*, Cat. No. 2048.0, ABS: Canberra, p8f.

## Financial arrangements & incomes of older people

A1.13 In 2004, the mean disposable income for couple households with at least one partner aged 65 years or more was \$597 per week. For single person households, the disposable income was \$350 per week.<sup>15</sup>

A1.14 In 2004, 66.9 per cent of households with a member aged 65 years or over were in receipt of income support from either Centrelink or the Department of Veterans' Affairs. For lone person households the reliance upon income support is greater at 76.5 per cent.<sup>16</sup>

A1.15 In 2005, there were nearly two million people (1,915,000 people) in receipt of the Age Pension. This number represents 66.3 per cent of all people who have reached qualifying age for the Age Pension.<sup>17</sup> This means the remaining 33.7 per cent of people who are of qualifying age are either self funded retirees, being supported by another person or have made alternate financial arrangements, such as taking out a reverse mortgage.

A1.16 Just over 59 per cent of Age Pension recipients are female,<sup>18</sup> reflecting their lessened ability to self-fund their own retirement. Over a third of Age Pensioners are aged between 60 and 69 years and over 10 per cent are aged 85 years and over. Of people aged 85 years and over, 71 per cent receive the Age Pension.<sup>19</sup>

A1.17 Overall, approximately 2 million people aged 65 years and over receive at least a part Age or Department of Veterans' Affairs pension. This figure represents 85 per cent of this age group. The breakdown demonstrates that 78 per cent of people aged 65 to 74 years and 93 per cent of people aged 85 years and over receive either of these pensions.<sup>20</sup>

A1.18 A recent study carried out for the Australian Government<sup>21</sup> highlights that the group who relied most heavily on government pensions in retirement were single women, closely followed by single men. Based on financial assets in 2002, a very small proportion of single retired women were able to afford a 'comfortable lifestyle', single men were better off than single women, and retired couples did best of all, with more than half able to afford either a modest or comfortable lifestyle.

A1.19 This difference is largely due to the differences in men's and women's superannuation savings – a result of women's career interruptions due to

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<sup>15</sup> ABS *Australian Social Trends 2006*, Data Cube, Table 1: Economic resources: National summary.

<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid*

<sup>18</sup> *Ibid*

<sup>19</sup> AIHW *Older Australia at a glance 2002* (3<sup>rd</sup> edition) AIHW Cat. No. AGE 25. 2002 Canberra: AIHW & DOHA, p20.

<sup>20</sup> *Ibid*, p20.

<sup>21</sup> Australian Government Office for Women *Aspects of Retirement for Older Women* Commonwealth of Australia 2006 p5

family responsibilities, gender-based wage rates prior to the 1970's equal pay cases, lower average wages compared to men, and the fact that prior to the introduction of compulsory superannuation, women were more likely to be in jobs where their employer did not contribute to a superannuation fund on their behalf.

- A1.20 The most common action taken to cope with reduced income in retirement was to cut back on normal weekly spending. This was more common for women, particularly single women, with 44 per cent saying they had cut down on weekly spending. Cutting down on less frequent expenditures was also common, with 40 per cent of single women, 28 per cent of single men, 24 per cent of partnered women and 24 per cent of partnered men reporting having had to do this. Compared to couples and single men, it was more common for single women to say they had to sell their home or move to lower cost accommodation because of their financial circumstances.<sup>22</sup>

### **Older people in paid work**

- A1.21 Between the ages of 45 years and 65 years, men's overall workforce participation rate almost halves while women's workforce participation rate drops by more than two thirds. Over the age of 65 years, less than 15 per cent of men and less than 7 per cent of women are in paid employment.<sup>23</sup>
- A1.22 Few younger men work part time, however for men aged 65 years and over there are similar numbers working part time and full time. Conversely, part time employment for women is almost as common as full time employment between the ages of 45 and 59 years of age and once women reach 60, part time employment becomes more common than full time employment.<sup>24</sup>
- A1.23 Between the ages of 60 and 64 there is a significant drop in participation in the paid workforce, from almost 544,000 in the 55 to 59 year age group to just over 265,000 in the 60 to 64 year age group.<sup>25</sup>
- A1.24 With many continuing to plan their retirement for the traditional 65 years of age, the number of workers aged 65 to 74 more than halves to around 131 500 people. Similar numbers of men work part time and full time between the ages of 65 and 74 (7.15 compared to 6.5 per cent of the male

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<sup>22</sup> Australian Government Office for Women *Aspects of Retirement for Older Women* Commonwealth of Australia 2006 p5

<sup>23</sup> In the area of employment, 45 years of age is commonly understood to represent the age after which keeping a job, finding a new job, being selected for promotion and being offered training opportunities become increasingly difficult. For this reason it is useful to look at the numbers of employed people aged between 45 and 65 years, as well as those aged 65 years and over: Compiled using ABS *Census of Population and Housing, Australia 2001* 'Age by sex, Count of persons, based on location on Census night' and 'Age by labour force status by sex, Count of persons, Based on location on Census night' tables.

<sup>24</sup> Compiled using ABS *Census of Population and Housing, Australia 2001* 'Age by sex, Count of persons, based on location on Census night' and 'Age by labour force status by sex, Count of persons, Based on location on Census night' tables.

<sup>25</sup> Ibid

population) with women continuing to work largely part time (3.89 compared to 1.94 per cent of the female population).<sup>26</sup>

- A1.25 For people aged 75 years and over there are only 31,602 people remaining in paid work. Around two percent of men work full time and a further two per cent part time, with around 1.3 per cent of women aged 75 years or more working part time and a further 0.6 per cent full time.<sup>27</sup>

### **Disability among older people & need for support services**

- A1.26 In 2003 one in five Australians in the general population had a disability. Amongst people aged 65 years and over the rate of disability is much higher, rising from 41 per cent of people aged 65 to 69 years to 92 per cent of people aged 90 years and over.<sup>28</sup>
- A1.27 The prevalence of people with a profound or severe core activity restriction rises in a different pattern from 10 per cent of people aged 65 to 69 years to 74 per cent of those aged 90 years and over.<sup>29</sup>
- A1.28 More than half of women aged 80 years and over have a profound or severe core-activity restriction (52 per cent), as do around one third of men the same age (34 per cent).<sup>30</sup>
- A1.29 A significant number of people aged 65 years and over, require at least some assistance with personal or health care, transport, housework, property maintenance or preparing meals. The numbers of people requiring assistance with personal or health care steadily rises from 27 per cent of people aged 65 to 70 years to 95 per cent of people aged 90 years and over.<sup>31</sup>
- A1.30 A 1988 American random sample survey<sup>32</sup> found that older people in poor health are three to four times more likely to experience an act or acts of abuse than those in good health.

### **Caring responsibilities of older people**

- A1.31 Older people often find themselves providing care for another person. The likelihood of a person providing care to someone else increases with age, peaking for women between the ages of 55 years and 64 years and for men

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<sup>26</sup> Compiled using ABS *Census of Population and Housing, Australia 2001* 'Age by sex, Count of persons, based on location on Census night' and 'Age by labour force status by sex, Count of persons, Based on location on Census night' tables.

<sup>27</sup> Ibid

<sup>28</sup> ABS *Disability ageing and carers: Summary of findings* Cat. No. 4430.0 2003 ABS Canberra p5.

<sup>29</sup> Ibid, p5.

<sup>30</sup> Ibid, p5.

<sup>31</sup> Ibid, p41.

<sup>32</sup> Karl Pillemer and David Finkelhor 'The prevalence of elder abuse, a random sample survey', *The Gerontologist* Vol. 28 No 1 1988 pp51-57.

aged over 75. Twenty two per cent of men and 19 per cent of women aged between 65 and 74 are carers.<sup>33</sup>

- A1.32 For people aged over 75, 24 per cent of men and 13 per cent of women provide care to a friend or family member.<sup>34</sup> Amongst people aged 75 years and over, most of the care is provided to a partner.<sup>35</sup>
- A1.33 A total of 93,700 people aged 65 years or more are providing primary care to a partner. Of these, almost 54 per cent are women.<sup>36</sup> The ABS estimates that approximately 4200 further people aged 65 years and over providing primary care to a child, 86 per cent of whom are older women.<sup>37</sup> An estimated 6400 older people provide primary care to a parent, 84 per cent of whom are women.
- A1.34 A further 2200 men and 6800 women aged 65 years and or more provide primary care for someone other than a partner, parent or child.<sup>38</sup>
- A1.35 The provision of care by older people is a significant - over 70 per cent of people providing care to a person with a profound core activity restriction are providing 40 hours or more care per week and over 35 per cent of people providing care to a person with a severe core activity restriction are providing 40 hours or more per week.<sup>39</sup>

### **Older people from CALD backgrounds**

- A1.36 The immigration policies of the post-war period have resulted in a growing proportion of the older population being from culturally and linguistically diverse backgrounds<sup>40</sup>. In 2001, people who were born overseas in non-English speaking countries predominantly came from Italy, Greece, Germany and the Netherlands.<sup>41</sup>
- A1.37 In 2001, one in three older Australians (784,600 people) had been born overseas. Of these, 61 per cent came from culturally and linguistically diverse backgrounds.<sup>42</sup>
- A1.38 Twelve per cent of the total population of older people aged 65 to 74 years came to Australia from CALD backgrounds. Less than two per cent of

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<sup>33</sup> ABS *Disability ageing and carers: Summary of findings* Cat. No. 4430.0 2003 ABS Canberra p49.

<sup>34</sup> ABS *Australian Social Trends 2005* Cat. No. 4102.0 ABS Canberra p2 and ABS *Disability ageing and carers: Summary of findings* Cat. No. 4430.0 2003 ABS Canberra p49.

<sup>35</sup> ABS *Australian Social Trends 2005* Cat. No. 4102.0 ABS Canberra p3.

<sup>36</sup> ABS *Disability ageing and carers: Summary of findings* Cat. No. 4430.0 2003 ABS Canberra p52.

<sup>37</sup> *Ibid*, p52

<sup>38</sup> *Ibid*, p52.

<sup>39</sup> *Ibid*, p54.

<sup>40</sup> The term culturally and linguistically diverse (CALD) background refers to people who are overseas born in non English-speaking countries: ie were not born in New Zealand, United Kingdom, Ireland, United States of America, Canada or South Africa.

<sup>41</sup> AIHW *Older Australia at a glance 2002* (3<sup>rd</sup> edition) AIHW Cat. No. AGE 25. Canberra AIHW & DOHA p3.

<sup>42</sup> *Ibid*, p3.



people aged 85 years and over came from CALD backgrounds. This profile will clearly change over the next 20 years as post-war immigrants age.<sup>43</sup>

- A1.39 In 2001, older men were estimated to comprise just under half (49 per cent) of the total population born overseas in non-English speaking countries, compared with older Australian born men males who make up 42 per cent of the older population.<sup>44</sup>

### **Indigenous older people**

- A1.40 Older Indigenous people face a range of very specific issues as a result of the characteristics of the Indigenous population, in particular high levels of disability.
- A1.41 Estimates suggest there are approximately 31,200 people of Aboriginal or Torres Strait Island descent who are aged 55 or older.<sup>45</sup> In 2001, this represented 6.7 per cent of the Indigenous population compared to 22 per cent of the whole Australian population.<sup>46</sup>
- A1.42 Indigenous older people, like other Indigenous people, are more likely to live in poorer socio economic circumstances: In 2002, the mean equivalised gross household income for Indigenous people aged 55 years and over was \$325 per week (\$308 for men and \$340 for women). A direct comparison for non-Indigenous people of the same age is not available, however for all Indigenous people the mean equivalised gross household income is \$394 compared to \$665 for non-Indigenous people (59 per cent).<sup>47</sup>
- A1.43 Income levels among Indigenous people generally decline with increased geographic remoteness: from 70 per cent of the corresponding income for non-Indigenous persons in major cities to 60 per cent in remote areas, and just 40 per cent in very remote areas.<sup>48</sup>
- A1.44 The living arrangements and family structure of the Indigenous population are very different to that of the non-Indigenous population. Households comprising Indigenous persons are, on average, larger than for all households and are more likely to comprise more than one family (11.6 per cent of older Indigenous persons (aged 50 years and over) live in a multi-family household. A direct comparison is not available however only 1.8 per cent of all older Australians (aged 65 years and over) live in a multi-family

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<sup>43</sup> AIHW *Older Australia at a glance 2002* (3<sup>rd</sup> edition) AIHW Cat. No. AGE 25. Canberra AIHW & DOHA p3.

<sup>44</sup> *Ibid*, p3.

<sup>45</sup> ABS *Year Book Australia 2005* Aboriginal and Torres Strait Islander Australians - projections 2001 to 2009 Cat No. 1301.0 ABS Canberra

<sup>46</sup> ABS *Census of Population and Housing Ageing in Australia 2001* Cat No. 2048.0 October 2003 ABS Canberra p21

<sup>47</sup> ABS *National Aboriginal and Torres Strait Islander Social Survey 2002* Cat No. 4714.0 June 2004 pp 27 and 29

<sup>48</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2005* Health Fact Sheet 2: The socio-economic status of Aboriginal and Torres Strait Islander peoples HREOC November 2005

household. Older Indigenous people are much less likely to be living with their partner only or on their own, and more likely to be living with their children or their children's family, or other relatives such as grandchildren, or parents.<sup>49</sup>

- A1.45 In 2002 the majority (70 per cent) of Indigenous people were living in rented dwellings. The proportion renting was higher in remote areas (86 per cent) where the majority of Indigenous people (64 per cent) were living in accommodation provided by Indigenous Housing Organisations or in other community housing. Overall, about a quarter (27 per cent) of Indigenous people were living in dwellings either owned or being purchased in 2002 (up from 22 per cent in 1994).<sup>50</sup>
- A1.46 The Australian Indigenous population's age profile is relatively young - the result of both high fertility and high mortality rates. People aged 65 years or over comprised 2.8 per cent of the Indigenous population compared to 12.8 per cent of the non-Indigenous population<sup>51</sup>
- A1.47 It is estimated that Indigenous people are at least twice as likely to have a profound or severe core activity limitation as non-Indigenous people and the prevalence of disability among Indigenous people is higher at all ages. In 2002, over two-thirds of people aged 55–64 years, and one-half of people aged 45–54 years had a disability or long-term health condition. The earlier onset of disability or long-term health conditions with a profound or severe core activity limitation indicates the comparatively higher need for service provision for Indigenous people with a disability at younger ages.<sup>52</sup>
- A1.48 Of the total of 12,900 Indigenous people aged 65 years or more, almost one third (3200 people) have a disability that severely or profoundly limits their activities. Older Indigenous men are more likely to be living with a significant disability than women: 28.7 per cent of men as compared to 22.3 per cent of women.<sup>53</sup>
- A1.49 Life expectancy for Indigenous Australians is significantly lower – by around 20 years - than it is for non-Indigenous Australians. Life expectancy at birth for Indigenous men in the 199-2001 period was 56.3 years (compared to 77 years for all Australian men) and was 62.8 years for Indigenous women (compared to 82.4 years for all Australian women).<sup>54</sup> It is important that consideration of the needs of older people includes the needs of Indigenous

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<sup>49</sup> ABS *Census of Population and Housing Ageing in Australia* 2001 Cat No. 2048.0 October 2003 ABS Canberra p36

<sup>50</sup> ABS *Year Book Australia 2005* Aboriginal and Torres Strait Islander population ABS: Canberra.

<sup>51</sup> Ibid

<sup>52</sup> ABS and AIHW *The Health and Welfare Of Australia's Aboriginal & Torres Strait Islander Peoples* Cat No. 4704.0 August 2005 pxxii

<sup>53</sup> AIHW *Disability rates among Aboriginal and Torres Strait Islander people – updating the Indigenous factor in disability services performance indicator denominators: Welfare Working Paper Series number 50* AIHW Cat. No. DIS 45 2006 Canberra: AIHW

<sup>54</sup> ABS *Census of Population and Housing Ageing in Australia* 2001 Cat No. 2048.0 October 2003 ABS Canberra p20

people from the age of 55 years when this population experiences similar issues to the broader older Australian population.

- A1.50 The Commonwealth's *Aged Care Act 1997* recognises the implications of these differences in disability and health status and life expectancy between Indigenous and other Australian population groups. When planning services for older people, the Government uses population estimates for the general population aged 70 years or over, compared with 50 years or over for Indigenous Australians.<sup>55</sup>
- A1.51 Death rates for Indigenous people aged between 65 and 74 years of age also differs from those of non-Indigenous people. Death rates per 1000 of the population aged 65 to 74 years are twice as high for Indigenous men than for non-Indigenous men and three times as high for Indigenous women than for non-Indigenous women.<sup>56</sup>
- A1. 52 Indigenous older people also have particular needs by virtue of where they live. While non-Indigenous Australians of all ages tend to live along the east and south-west coasts, the Indigenous population is more widely spread across the continent. Indigenous people are also 13 times more likely to live in very remote areas than non-Indigenous people.

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<sup>55</sup> ABS and AIHW *The Health and Welfare Of Australia's Aboriginal & Torres Strait Islander Peoples* Cat No. 4704.0 August 2005 p222

<sup>56</sup> AIHW *Older Australia at a glance 2002* (3<sup>rd</sup> edition) AIHW Cat. No. AGE 25 Canberra AIHW & DOHA p48.

## Appendix 2:

### Australia's International Obligations with Respect to Discrimination against Older People

A2.1 In 1982 the United Nations held the first World Assembly on Ageing in Vienna. This was in response to the increasing number of older people throughout the world and an increasing focus on their issues. The Assembly aimed to bring attention to the economic, psychosocial and health-care concerns of the older person. As a result, the Vienna International Plan of Action on Ageing (the Vienna Plan) calling for humanitarian and developmental approaches to ageing, was developed.

A2.2 The Vienna Plan was endorsed by the UN General Assembly and details the measures member states should take to safeguard the rights of older people within the context of the rights proclaimed in the International Human Rights Covenants.

A2.3 In 1991, the UN General Assembly adopted the Principles for Older Persons.

These Principles are divided into five sections –

- *independence* - access to adequate water, food, shelter, clothing and health care and the opportunity to undertake remunerated work and access to education and training
- *participation* – the right to participate actively in the formulation of policies which affect older people's wellbeing, to share their knowledge and skills with younger people and to be able to form associations
- *care* – to ensure that older people can benefit from family care and health care and enjoy fundamental freedoms and human rights if residing in a care or treatment facility or shelter
- *self fulfilment* – older people should be able to pursue the full development of their potential through access to education, cultural, spiritual and recreational resources in their communities and
- *dignity* – an entitlement to live in dignity and security, free of exploitation or abuse and regardless of age, sex, race or ethnic background, disability, financial situation or other status, and to be valued regardless of as person's economic contribution.<sup>57</sup>

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<sup>57</sup> Office of the United Nations High Commissioner for Human Rights *The economic, social and cultural rights of older persons: CESCR General Comment No. 6* Thirteenth Session 1995 8/12/95 Office of the United Nations High Commissioner for Human Rights Geneva

- A2.4 In 1992 the UN General Assembly adopted the Proclamation on Ageing in commemoration of the 10<sup>th</sup> anniversary of the adoption of the Vienna Plan, in which it paid particular attention to encouraging national initiatives which ensured adequate financial support for older women, assisted older men to develop their capacities beyond that of breadwinner, supported families to provide care and increased international cooperation on reaching global targets for ageing for 2001.
- A2.5 In 2002, the UN Second World Assembly on Ageing adopted the Madrid Political Declaration and International Plan of Action on Ageing (MIPAA). The Plan set a series of goals and objectives to improve the social and economic conditions of older people based around a number of central themes including:
- A2.6 The full realization of all human rights and fundamental freedoms of all older persons;
- The achievement of secure ageing, which involves reaffirming the goal of eradicating poverty in old age and building on the United Nations Principles for Older Persons;
  - Empowerment of older persons to fully and effectively participate in the economic, political and social lives of their societies, including through income-generating and voluntary work;
  - Provision of opportunities for individual development, self-fulfilment and well-being throughout life as well as in late life, through, for example, access to lifelong learning and participation in the community while recognizing that older persons are not one homogenous group;
  - Ensuring the full enjoyment of economic, social and cultural rights, and civil and political rights of persons and the elimination of all forms of violence and discrimination against older persons;
  - Commitment to gender equality among older persons through, inter alia, elimination of gender-based discrimination;
  - **Recognition of the crucial importance of families, intergenerational interdependence, solidarity and reciprocity for social development;**
  - **Provision of health care, support and social protection for older persons, including preventive and rehabilitative health care;**
  - **Facilitating partnership between all levels of government, civil society, the private sector and older persons themselves in translating the International Plan of Action into practical action;**
  - **Harnessing of scientific research and expertise and realizing the potential of technology to focus on, inter alia, the individual, social and health implications of ageing, in particular in developing countries;**

- **Recognition of the situation of ageing indigenous persons, their unique circumstances and the need to seek means to give them an effective voice in decisions directly affecting them.**<sup>58</sup>

A2.7 In adopting MIPAA, UN member states commit themselves to including ageing in all social and economic policies at an international level, however MIPAA is not legally binding and relies upon member states to put the plan into action in the context of domestic law and political priorities. Some experts have argued that given the enormous significance of ageing to the global community that older people should be protected through a legally binding convention in the same way as women and children are afforded protection through CEDAW and CROC.<sup>59</sup>

A2.8 Australia has accepted a number of additional international obligations in relation to older people, in particular:

- **ILO 111 Discrimination (Employment and Occupation) Convention 1958**<sup>60</sup>
- **The International Covenant on Civil and Political Rights**<sup>61</sup>
- **The International Covenant on Economic, Social and Cultural Rights**<sup>62</sup>; and
- **ILO Recommendation 162 Concerning Older Workers 1980**<sup>63</sup>

A2.9 These instruments require Australia to eliminate employment related discrimination against older people, to ensure that economic, social, cultural, civil and political rights are available to all people without discrimination, to ensure that all people are equal before the law and entitled to the equal protection of the law, to eliminate discrimination in all areas of public life regulated by government.

A2.10 ILO Recommendation 162 further specifies that Member(s) should, within the framework of a national policy to promote equality of opportunity and treatment for workers, whatever their age, and of laws and regulations and of practice on the subject, take measures for the prevention of discrimination in employment and occupation with regard to older workers.<sup>64</sup>

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<sup>58</sup> United Nations *Report on the Second World Assembly on Ageing* Madrid 8-12 April 2002 United Nations New York p7-8

<sup>59</sup> See for example Alischa Kugel *Recognizing Older Persons Needs, Rights and Contributions: A Society for All Ages? Not Yet* Global Action on Aging August 2006

<sup>60</sup> Schedule 1 to HREOCA

<sup>61</sup> Schedule 2 to HREOCA: At Article 2

<sup>62</sup> At Articles 2 and 26: Ratified by Australia in 1975

<sup>63</sup> Australia is a Member State of the ILO and as such is required by the ILO Constitution to give Recommendations "consideration with a view to effect being given to it by national legislation or otherwise": ILO Constitution Article 19

<sup>64</sup> At paragraph 3. For full text of ILO Recommendation 162, see Appendix 1.

A2.11 ILO Recommendation 162 also provides that [o]lder workers should, without discrimination by reason of their age, enjoy equality of opportunity and treatment with other workers as regards, in particular:

- **access to vocational guidance and placement services;**
- **access, taking account of their personal skills, experience and qualifications, to-**
  - employment of their choice in both the public and private sectors: Provided that in exceptional cases age limits may be set because of special requirements, conditions or rules of certain types of employment;
  - vocational training facilities, in particular further training and retraining;
  - paid educational leave, in particular for the purpose of training and trade union education;
  - promotion and eligibility for distribution of tasks;
  - employment security, subject to national law and practice relating to termination of employment and subject to the results of the examination referred to in Paragraph 22 of this Recommendation;
  - remuneration for work of equal value;
  - social security measures and welfare benefits;
  - conditions of work, including occupational safety and health measures;
  - access to housing, social services and health institutions, in particular when this access is related to occupational activity or employment.

## **Appendix 3:**

### **International Labour Organisation, R162 Recommendation concerning Older Workers, 1980**

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-sixth Session on 4 June 1980, and

Recalling that the Discrimination (Employment and Occupation) Convention and Recommendation, 1958, do not include age among the grounds for discrimination listed therein, but provide for possible additions to the list, and

Recalling the specific provisions relating to older workers in the Employment Policy Recommendation, 1964, and in the Human Resources Development Recommendation, 1975, and

Recalling the terms of existing instruments relating to the social security of older persons, in particular the Invalidity, Old-Age and Survivors' Benefits Convention and Recommendation, 1967, and

Recalling also the provisions of article 6, paragraph (3), of the Declaration on Equality of Opportunity and Treatment for Women Workers, adopted by the International Labour Conference at its Sixtieth Session in 1975, and

Considering it desirable to supplement the existing instruments with standards on equality of opportunity and treatment for older workers, on their protection in employment and on preparation for and access to retirement, and

Having decided upon the adoption of certain proposals with regard to older workers: work and retirement, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation,

adopts this twenty-third day of June of the year one thousand nine hundred and eighty, the following Recommendation, which may be cited as the Older Workers Recommendation, 1980:

#### **I. General Provisions**

1.

(1) This Recommendation applies to all workers who are liable to encounter difficulties in employment and occupation because of advancement in age.

(2) In giving effect to this Recommendation, a more precise definition of the workers to whom it applies, with reference to specific age categories, may be adopted in



each country, in a manner consistent with national laws, regulations and practice and appropriate under local conditions.

(3) The workers to whom this Recommendation applies are referred to herein as older workers.

2. Employment problems of older workers should be dealt with in the context of an over-all and well balanced strategy for full employment and, at the level of the undertaking, of an over-all and well balanced social policy, due attention being given to all population groups, thereby ensuring that employment problems are not shifted from one group to another.

## **II. Equality of Opportunity and Treatment**

3. Each Member should, within the framework of a national policy to promote equality of opportunity and treatment for workers, whatever their age, and of laws and regulations and of practice on the subject, take measures for the prevention of discrimination in employment and occupation with regard to older workers.

4. Each Member should, by methods appropriate to national conditions and practice--

(a) make provision for the effective participation of employers' and workers' organisations in formulating the policy referred to in Paragraph 3 of this Recommendation;

(b) make provision for the effective participation of employers' and workers' organisations in promoting the acceptance and observance of this policy;

(c) enact such legislation and/or promote such programmes as may be calculated to secure the acceptance and observance of the policy.

5. Older workers should, without discrimination by reason of their age, enjoy equality of opportunity and treatment with other workers as regards, in particular--

(a) access to vocational guidance and placement services;

(b) access, taking account of their personal skills, experience and qualifications, to--

(i) employment of their choice in both the public and private sectors: Provided that in exceptional cases age limits may be set because of special requirements, conditions or rules of certain types of employment;

(ii) vocational training facilities, in particular further training and retraining;

(iii) paid educational leave, in particular for the purpose of training and trade union education;

(iv) promotion and eligibility for distribution of tasks;

(c) employment security, subject to national law and practice relating to termination of employment and subject to the results of the examination referred to in Paragraph 22 of this Recommendation;

(d) remuneration for work of equal value;

(e) social security measures and welfare benefits;

(f) conditions of work, including occupational safety and health measures;

(g) access to housing, social services and health institutions, in particular when this access is related to occupational activity or employment.

6. Each Member should examine relevant statutory provisions and administrative regulations and practices in order to adapt them to the policy referred to in Paragraph 3 of this Recommendation.

7. Each Member should, by methods appropriate to national conditions and practice-

(a) ensure as far as possible the observance of the policy referred to in Paragraph 3 of this Recommendation in all activities under the direction or control of a public authority;

(b) promote the observance of that policy in all other activities, in co-operation with employers' and workers' organisations and any other bodies concerned.

8. Older workers and trade union organisations as well as employers and their organisations should have access to bodies empowered to examine and investigate complaints regarding equality of opportunity and treatment, with a view to securing the correction of any practices regarded as in conflict with the policy.

9. All appropriate measures should be taken to ensure that guidance, training and placement services provide older workers with the facilities, advice and assistance they may need to enable them to take full advantage of equality of opportunity and treatment.

10. Application of the policy referred to in Paragraph 3 of this Recommendation should not adversely affect such special protection or assistance for older workers as is recognised to be necessary.

### **III. Protection**

11. Within the framework of a national policy to improve working conditions and the working environment at all stages of working life, measures appropriate to national conditions and practice designed to enable older workers to continue in employment under satisfactory conditions should be devised, with the participation of the representative organisations of employers and workers.

12.

(1) Studies should be undertaken, with the participation of employers' and workers' organisations, in order to identify the types of activity likely to hasten the ageing process or in which older workers encounter difficulties in adapting to the demands of their work, to determine the reasons, and to devise appropriate solutions.

(2) These studies may be part of a general system for evaluating jobs and corresponding skills.

(3) The results of the studies should be widely disseminated, in particular to employers' and workers' organisations, and, as the case may be, through them to the older workers concerned.

13. Where the reasons for the difficulties in adaptation encountered by older workers are mainly related to advancement in age, measures in respect of the type of activity in question should to the extent practicable be applied so as to--

(a) remedy those conditions of work and of the working environment that are likely to hasten the ageing process;

(b) modify the forms of work organisation and working time which lead to stress or to an excessive pace of work in relation to the possibilities of the workers concerned, in particular by limiting overtime;

(c) adapt the job and its content to the worker by recourse to all available technical means and, in particular, to ergonomic principles, so as to preserve health, prevent accidents and maintain working capacity;

(d) provide for a more systematic supervision of the workers' state of health;

(e) provide for such supervision on the job as is appropriate for preserving the workers' safety and health.

14. Among the measures to give effect to Paragraph 13, clause (b), of this Recommendation, the following might be taken at the level of the undertaking, after consulting the workers' representatives or with the participation of their representative organisations, or through collective bargaining, according to the practice prevailing in each country:

(a) reducing the normal daily and weekly hours of work of older workers employed on arduous, hazardous or unhealthy work;

(b) promoting the gradual reduction of hours of work, during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit, of all older workers who request such reduction;

(c) increasing annual holidays with pay on the basis of length of service or of age;

(d) enabling older workers to organise their work time and leisure to suit their convenience, particularly by facilitating their part-time employment and providing for flexible working hours;

(e) facilitating the assignment of older workers to jobs performed during normal day-time working hours after a certain number of years of assignment to continuous or semi-continuous shift work.

15. Every effort should be made to meet the difficulties encountered by older workers through guidance and training measures such as those provided for in Paragraph 50 of the Human Resources Development Recommendation, 1975.

16.

(1) With the participation of the representative organisations of employers and workers, measures should be taken with a view to applying to older workers, wherever possible, systems of remuneration adapted to their needs.

(2) These measures might include--

(a) use of systems of remuneration that take account not only of speed of performance but also of know-how and experience;

(b) the transfer of older workers from work paid by results to work paid by time.

17. Measures might also be taken to make available to older workers if they so desire other employment opportunities in their own or in another occupation in which they can make use of their talents and experience, as far as possible without loss of earnings.

18. In cases of reduction of the workforce, particularly in declining industries, special efforts should be made to take account of the specific needs of older workers, for instance by facilitating retraining for other industries, by providing assistance in securing new employment or by providing adequate income protection or adequate financial compensation.

19. Special efforts should be made to facilitate the entry or re-entry into employment of older persons seeking work after having been out of employment due to their family responsibilities.

#### **IV. Preparation for and Access to Retirement**

20. For the purposes of this Part of this Recommendation--

(a) the term ***prescribed*** means determined by or in virtue of one of the means of action referred to in Paragraph 31 of this Recommendation;

(b) the term ***old-age benefit*** means a benefit provided in the case of survival beyond a prescribed age;

(c) the term ***retirement benefit*** means old-age benefit the award of which is subject to the cessation of any gainful activity;

(d) the expression ***age normally qualifying workers for an old-age benefit*** means the prescribed age for award of old-age benefit with reference to which such an award can be either advanced or postponed;

(e) the term ***long-service benefit*** means a benefit the grant of which depends only upon the completion of a long qualifying period, irrespective of age;

(f) the term ***qualifying period*** means a period of contribution, or a period of employment, or a period of residence, or any combination thereof, as may be prescribed.

21. Wherever possible, measures should be taken with a view to--

(a) ensuring that, in a framework allowing for a gradual transition from working life to freedom of activity, retirement is voluntary;

(b) making the age qualifying for an old-age pension flexible.

22. Legislative and other provisions making mandatory the termination of employment at a specified age should be examined in the light of the preceding Paragraph and Paragraph 3 of this Recommendation.

23.

(1) Subject to its policy regarding special benefits, each Member should endeavour to ensure that older workers whose hours of work are gradually reduced and reach a prescribed level, or who start to work on a part-time basis, receive, during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit, a special benefit in partial or full compensation for the reduction in their remuneration.

(2) The amount and conditions of the special benefit referred to in subparagraph (1) of this Paragraph should be prescribed; where appropriate, the special benefit should be treated as earnings for the purpose of calculating old-age benefit and the period during which it is paid should be taken into account in such calculation.

24.

(1) Older workers who are unemployed during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit should, where an unemployment benefit scheme exists, continue until such date to receive unemployment benefit or adequate income maintenance.

(2) Alternatively, older workers who have been unemployed for at least one year should be eligible for an early retirement benefit during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit; the grant of early retirement benefit should not be made dependent upon a qualifying period longer than that required at the age normally qualifying workers for an old-age benefit and its amount, corresponding to that of the benefit the worker concerned would have received at that age, should not be reduced to offset the

probable longer duration of payment, but, for the purpose of calculating this amount, the period separating the actual age from the age normally qualifying workers for an old-age benefit need not be included in the qualifying period.

25.

(1) Older workers who--

(a) have been engaged in occupations that are deemed arduous or unhealthy, for the purpose of old-age benefit, by national laws or regulations or national practice, or

(b) are recognised as being unfit for work to a degree prescribed, should be eligible, during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit, for an early retirement benefit the grant of which may be made dependent upon a prescribed qualifying period; the amount of the benefit, corresponding to that of the benefit the worker concerned would have received at the age normally qualifying workers to an old-age benefit, should not be reduced to offset the probable longer duration of payment, but, for the purpose of calculating this amount, the period separating the actual age from the age normally qualifying workers for an old-age benefit need not be included in the qualifying period.

(2) The provisions of subparagraph (1) of this Paragraph do not apply to--

(a) persons in receipt of an invalidity or other pension on grounds of incapacity for work corresponding to a degree of invalidity or incapacity at least equal to that required to qualify for an early retirement benefit;

(b) persons for whom adequate provision is made through occupational pension schemes or other social security benefits.

26. Older workers to whom Paragraphs 24 and 25 do not apply should be eligible for an early old-age benefit during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit, subject to such reductions as may be made in the amount of any periodical old-age benefit they would have received at that age.

27. Under schemes in which the grant of an old-age benefit depends on the payment of contributions or on a period of occupational activity, older workers who have completed a prescribed qualifying period should be entitled to receive a long-service benefit.

28. The provisions of Paragraphs 26 and 27 of this Recommendation need not be applied by schemes in which workers can qualify for an old-age benefit at the age of sixty-five or earlier.

29. Older workers who are fit for work should be able to defer their claim to an old-age benefit beyond the age normally qualifying workers for such a benefit, for example either for the purpose of satisfying all qualifying conditions for benefit or with a view to receiving benefit at a higher rate taking account of the later age at

which the benefit is taken and, as the case may be, of the additional work or contributions.

30.

(1) Retirement preparation programmes should be implemented during the years preceding the end of working life with the participation or representative organisations of employers and workers and other bodies concerned. In this connection, account should be taken of the Paid Educational Leave Convention, 1974.

(2) Such programmes should, in particular, enable the persons concerned to make plans for their retirement and to adapt to the new situation by providing them with information on--

(a) income and, in particular, the old-age benefit they can expect to receive, their tax status as pensioners, and the related advantages available to them such as medical care, social services and any reduction in the cost of certain public services;

(b) the opportunities and conditions for continuing an occupational activity, particularly on a part-time basis, and on the possibility of establishing themselves as self-employed;

(c) the ageing process and measures to attenuate it such as medical examinations, physical exercise and appropriate diet;

(d) how to use leisure time;

(e) the availability of facilities for the education of adults, whether for coping with the particular problems of retirement or for maintaining or developing interests and skills.

## **V. Implementation**

31. Effect may be given to this Recommendation, by stages as necessary, through laws or regulations or collective agreements or in any other manner consistent with national practice and taking account of national economic and social conditions.

32. Appropriate measures should be taken with a view to informing the public and, more particularly, those responsible for guidance, training, placement and the social services concerned, as well as employers, workers and their respective organisations, of the problems which older workers may encounter in respect, in particular, of the matters dealt with in Paragraph 5 of this Recommendation and of the desirability of helping them to overcome such problems.

33. Measures should be taken to ensure that older workers are fully informed of their rights and opportunities and encouraged to avail themselves of them.