



Queensland Human Rights Commission (QHRC)
Review of the *Anti-Discrimination Act 1991* - COTA Queensland submission



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Introduction

The Council on the Ageing (COTA) Queensland welcomes this opportunity to provide a submission to the Queensland Human Rights Commission's review of the Anti-Discrimination Act 1991. COTA Queensland, a for-purpose registered charity, is the Seniors peak organisation, advancing the rights, needs, interests and futures of people as we age with the vision that ageing is a time of possibility, opportunity, and influence. With the large and growing number of older people in our state at the centre, we have worked to influence positive outcomes for Queenslanders for over sixty years. We provide a connection point for older people, their families and communities, organisations, and Governments at all levels to address issues for Queenslanders and co-create change.

COTA Queensland provides independent information and education for older people, their communities, and organisations as well as education and training, advice, and other services to the public and private sectors. We work across diverse issues, including the following areas which we consider pertinent to this Inquiry: aged care, general health and health systems, mental health, palliative, and end of life care; and those factors which interact with or impact on accessibility to services and supports in these areas including, for example, human rights and legal protections, digital inclusion, age discrimination, housing, and transport.

COTA Queensland acknowledges that the avenue of redress provided through the Anti-discrimination Act 1991 has played a major role in addressing the various forms of discrimination that have been prevalent in our society. However, of major concern are the continued existence s32 Retiring age for partners and s106A Compulsory retirement age under legislation etc. Both sections of the Act enable the imposition of a compulsory retirement age on partnerships and certain occupations under legislation.

The continuation of this direct age discrimination in employment in Queensland undermines the progress made in preventing age discrimination within this state. COTA Queensland recommends that these exemptions to age discrimination be removed from the Anti-Discrimination Act 1991.

Addressing Ageism in Employment

Ageism can be described as 'a process of systematic stereotyping of, and discrimination against people' simply because they are older. In other words, older individuals are 'lumped together' or thought of as all being the same just because of their age. This can lead to them being treated unfavourably.... Either way, the implication is that a person's age becomes a badge for pre-determined or pre-set behaviour regardless of that person's actual individual qualities.ⁱ

Thornton and Lukerⁱⁱ observe: *While the corollary of an ageing population is an ageing workforce, the social policy response to older people remaining in employment has been ambivalent. There is a level of social acceptance of ageist attitudes because the association of ageing with obsolescence is seen as essential to social regeneration: it is generally accepted that older people should 'move over' to make way for the next generation.*

The United States Senate Special Committee on Agingⁱⁱⁱ found that: *Probably no form of age*

discrimination in employment is as pernicious or far-reaching in its impact as mandatory retirement. In effect, it consigns a person to the sidelines of human activity, imparting a cachet of uselessness in a society that equates personal worth with work.

The U.S. Equal Employment Opportunity Commission^{iv} comments that: *The emotional harm of any discrimination is traumatic. For older workers, they typically feel betrayed when they have given many years of their working lives to one employer. Research shows that perceived age discrimination results in serious negative health effects, in part, because with advancing age, older individuals are exposed to more negative ageist stereotypes that make them feel older than their chronological age. Forced retirement correlates with significant declines in mental and physical health that can lead to shortened life spans.*

Rachel Patterson^v explains the problematic nature of age discrimination as follows: *Age discrimination involves acting against the interests of another at least in part because of his or her age. The selection of age as a criterion for such treatment is arbitrary and incompatible with the demands of practical reasonableness which holds that there is no objective hierarchy between persons and which requires impartiality in our behaviour towards others.... Ageism, therefore, is morally unreasonable (irrational) and itself contrary to the basic good of practical reasonableness.*

In an address to the **11th Session of the United Nations Open-ended Working Group on Ageing Focus Area: Panel on the Right to Work and Access to the Labour Market** it was stated that ... *Older persons are confronted with discriminatory treatment in recruitment, employment terms and conditions, inadequate or inexistent accessibility conditions, lack of training and promotion opportunities, and pressure to retire. Such discriminatory treatment is grounded in negative stereotypes perceiving older persons as having a limited ability to learn new skills and decreased productivity. ... Mandatory retirement ages are another challenge to the full realization of the right to work of older persons.*^{vi}

Ageism and age discrimination are particularly significant in employment, despite human rights and anti-discrimination legislation being in force. A fully age-friendly Queensland will not be achieved if the current inequities in the labour market are not addressed. The Queensland Government should be leading the way in addressing age discrimination and not maintaining ageist legislative provisions that use age as a proxy for capability.

The Australian Human Rights Commission reports that: *...Results from the National prevalence survey of age discrimination in the workplace (2015) indicate that age discrimination is an ongoing and common occurrence in Australian workplaces. ... Age discrimination can occur at all stages in the employment cycle. Experiencing discrimination diminishes a person's self-worth, self-esteem and can reduce motivation to stay in work. Other factors such as gender, cultural background, sexual orientation and geographic location also shape the nature and consequences of discrimination... Employers may hold negative assumptions and stereotypes about older workers.*^{vii}

The United Nations has long advocated for a more integrated approach to ageing by governments that results in:

Creating a society for all ages that leaves no one behind requires policymakers to understand the

diverse and evolving needs, rights and preferences of individuals across their life course and along individual ageing trajectories. The Guidelines therefore recommend a ‘twin-track approach’ to mainstreaming ageing that considers ageing from a societal as well as from an individual perspective. A ‘twin-track approach’ enables societies to realize the potential of living longer while ensuring sustainable adaptations of education systems, labour markets, health and social care, and social security and protection systems to growing proportions of older persons.^{vii}

The successful creation of age-friendly living environments in Queensland will require all tiers and agencies of government to consider adopting a ‘twin-track approach’ to mainstreaming ageing. For example, an age-friendly labour market must be underpinned by government and industry policies that facilitate continued access to employment for all individuals who wish to continue their working life beyond existing mandatory retirement ages.

History of Compulsory Retirement¹ Age in Queensland

A rationale of age discrimination is that a person’s age ought not be used as a proxy for assessing their ability to work as they get older. It is, therefore, unlawful to impose compulsory ages for retirement, although there are exceptions...^{ix}

The Queensland Anti-Discrimination Act 1991^x contains two compulsory retirement provisions based on age which serve as exemptions to discrimination on the basis of age. Section 32 Retiring Age for Partners enables a retirement age to be set in a partnership agreement; upon reaching that age a person must retire from the partnership.

Section 106A allows age discrimination to occur in respect to compulsory retirement ages being allowed for certain occupations through an exemption at s106A. Those occupations are:

- (a) a Supreme Court judge;*
- or (b) a District Court judge;*
- or (c) a magistrate;*
- or (d) a member of the Land Court;*
- or (e) the president, the vice-president or a deputy president (court) of the Industrial Court; or*
- (f) a deputy president appointed under the Industrial Relations Act 2016, section 441*
- or an industrial commissioner;*
- or (h) a fire officer within the meaning of the Fire and Emergency Services Act 1990;*
- or (k) a police officer;*
- or (m) a director of a public company or subsidiary of a public company;*
- or (n) another person prescribed by regulation.*

The number of occupations exempted under s106A has been reduced since the compulsory retirement section was introduced. Those occupations where the compulsory retirement age has been removed are: the Commissioner of Fire Service, Chief Executive of Queensland Railways, an

¹ The term “compulsory retirement” is misleading. The Cambridge Dictionary defines retirement *as the act of leaving your job and stopping working, usually because you are old*¹. A person may be required to terminate employment with an organisation because they have reached the age specified for retirement in legislation. However, it is ageist to presume that an individual will permanently retire from the workforce at this point. Individuals may choose to apply their knowledge and capabilities towards other employment options. A more appropriate term to use instead of compulsory retirement is compulsory employment termination.

employee of Queensland Railways; a staff member within the meaning of Statute No. 14 (Staff tenure) made under the University of Queensland Act 1965.

The Goss Government when considering the introduction of the Anti-Discrimination Bill in 1991 gave special consideration to the proposed compulsory retirement provision and whether the then Clause 32 (the then compulsory retirement clause) should have a two-year sunset clause.^{xi} Cabinet decided ... *That an amendment be moved in the Committee stages of the debate on the Bill to amend Clause 32 to provide for a two year sunset clause.*^{xii} The two-year sunset clause was considered necessary to allow employers sufficient time to make the changes required to respond to the removal of compulsory retirement ages.

In 1991 when the Goss Government was considering the curtailment of compulsory retirement ages within Queensland other jurisdictions had made the following progress towards this objective^{xiii}:

- *New South Wales - Legislation prohibits compulsory retirement. This is being phased in over a three-year period ending on 1 January 1993. The public sector requirement for compulsory retirement was phased in over 2 years with extension to the private sector after an additional year.*
- *South Australia - Legislation commenced on 1 June 1991 which prohibits discrimination on the ground of age. Prohibition of compulsory retirement is a concomitant, effective from 1 June 1993.*
- *Western Australia - Compulsory retirement has been removed from the public service and a discussion paper, on the extension to the private sector, has been released.*
- *Victoria - The Law Reform Commission has recommended the abolition of compulsory retirement.*

In 1994, the Anti-Discrimination Amendment Act 1994^{xiv} was passed and it introduced s32 and s106A. The reasons for the changes were detailed in the Explanatory Notes to the Bill: *At the time the Anti-Discrimination Act was introduced, it contained a sunset clause (s.32) in relation to the imposition of compulsory age retirement and it was stated in Parliament that the intention of the sunset clause was to abolish compulsory retirement outright. This Bill now gives effect to that stated intention by specifying the precise terms of the transition from a system in which compulsory retirement is the norm to a system in which compulsory retirement is abolished.*^{xv}

Despite being abolished compulsory retirement ages still exist through s32 and s106A for partnerships and those occupations captured under s106A for no justifiable reason apart from possibly meeting the narrow minded and bureaucratic needs of interest groups.

Today, the situation in other Australian jurisdictions is varied, Victoria does not allow any exceptions in relation to compulsory retirement age. New South Wales allows exceptions only for judicial officers and statutory appointees. Western Australia allows exceptions for judicial appointees only. The South Australian Equal Opportunity Act 1984 does not allow for compulsory retirement ages. The Commonwealth allows compulsory retirement ages for the judiciary and defence forces. The Northern Territory and Tasmania have no legislative provisions in place that would prohibit the setting of compulsory ages^{xvi}. Countries where compulsory retirement ages have been abolished are the United States of America, Canada and New Zealand.^{xvii}

Age Versus Capacity

In respect to compulsory retirement the Australian Law Reform Commission noted that it ... *favours individual capacity-based assessment rather than the imposition of compulsory retirement. This position was strongly supported by stakeholders throughout the Inquiry. The imposition of compulsory retirement fails to account for the differing capacities of individuals at older ages, reinforces stereotypes about the abilities of mature age workers and reduces utilisation of the workforce contribution of mature age workers.*^{xviii}

Equally, there appears to be no justification for compulsory retirement ages for members of the judiciary. Victoria no longer allows compulsory retirement ages to be set for the judiciary.^{xix} Alysia Blackham wrote, *Even for the judiciary, mandatory retirement ages are outdated and inefficient. When they were introduced at the federal level in 1977, retirement ages were intended to "contemporise" the courts by introducing new people and ideas. They were designed to prevent declining performance on the bench and provide opportunities for younger judges. But the workforce and our attitudes to older workers have changed since 1977. ... mandatory retirement ages for judges are inconsistent with modern workplace practices and are contrary to the desire for age equality. There is no evidence that older judges are "out of touch", and age is a bad predictor of individual capacity. Instead, judicial retirement ages may deprive the courts of expertise and experience. Retirement ages also appear to be contrary to the wishes of judges themselves. Justice Graham Bell, who retired from the Family Court of Australia on 20 February 2015, was quoted as saying:*

These days 70 is equal to 60 or 55. ... Judges should be able to go on till 80 provided they pass a medical inspection. After all, the pension makes judges pretty expensive creatures in retirement. They are sent out to pasture too early.^{xx}

The question needs to be asked in respect to fire officers and police officers: If other Australian jurisdictions can operate effectively without compulsory retirement ages for these occupations why cannot the same be achieved in Queensland? The reality of the situation is that probably not a large number of fire officers and police officers would choose to continue in those occupations beyond current retirement ages. However, those that wish to should not be denied the opportunity to do so.

Public safety is an often-used justification for imposing mandatory retirement ages on the occupations of police officer and fire officer. This issue has been a subject of much debate in the United States, and the United States Senate Select Committee on Aging in its 1984 Report, *The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel*,^{xxi} made the following findings:

The principal arguments used to justify early mandatory retirement for public safety workers is that the strenuous nature of the work can only be performed by the "young and vigorous." Mandatory retirement is necessary, so the argument goes, to maintain a physically fit police force or fire department in order to protect the "public safety."... An abundance of scientific evidence exists showing that chronological age is a poor indicator of ability to perform a job. Research also shows that older workers do not show significant declines in muscle strength and that their performance in many jobs is equal to, or better than, the job performance of younger workers. Physiologists; have

demonstrated that other factors, such as aerobic and muscular fitness and amount of body fat, are more important in predicting poor performance than is age. Police and fire departments that have implemented physical fitness programs and individual testing procedures in lieu of age restrictions have noted improved health and performance and fewer disability claims. Age contributes to a police officer's or firefighters' knowledge, skill and experience on the Job and contributes to improved performance and a lower injury rate.

It should also be noted that not all police officers and fire officers who are approaching their respective mandatory retirement ages are engaged in strenuous occupational activities. Both of these occupations have a variety of career paths that can be followed within the respective services. It should also be noted that Rural Fire Service volunteers do not have a mandatory retirement age. In many brigades there are members who are over sixty years of age. These older volunteers when undertaking fire duties still have the physical capacity to spend long hours on the fireground dragging fire hoses, blacking out, clearing firebreaks and numerous other duties.

The two research studies below show that unless you develop an underlying medical condition that could inhibit your physical performance a person can maintain a good level of physical fitness into their older years. Therefore, the age of an individual cannot be used to determine a person's level of fitness whether they be 30 or 65 years of age.

A German research study^{xxii} of marathon runners between 20 to 79 years of age found that: *No significant age-related decline in performance appears before age 55. Moreover, only a moderate decline is seen thereafter; in fact, 25% of the 65- to 69-year-old runners were faster than 50% of the 20- to 54-year-old runners. Our survey also revealed that more than 25% of the 50- to 69-year-old runners had started their marathon training only in the past 5 years. The study concluded that: Performance losses in middle age are mainly due to a sedentary lifestyle, rather than biological aging. The large contingent of older "new-comers" among marathon runners demonstrates that, even at an advanced age, non-athletes can achieve high levels of performance through regular training.*

A 2015 Canadian study^{xxiii} reports the following: *... Along with chronological age comes age-related declines in functional capacity associated with impairments to the cardiorespiratory and muscular systems. As a result, older workers are reported to exhibit reductions in work output and in the ability to perform and/or sustain the required effort when performing work tasks. However, research has presented some conflicting views on the consequences of aging in the workforce, as physically demanding occupations can be associated with improved or maintained physical function. Furthermore, the current methods for evaluating physical function in older workers often lack specificity and relevance to the actual work tasks, leading to an underestimation of physical capacity in the older worker. Nevertheless, industry often lacks the appropriate information and/or tools to accommodate the aging workforce, particularly in the context of physical employment standards. Ultimately, if appropriate workplace strategies and work performance standards are adopted to optimize the strengths and protect against the vulnerability of the aging workers, they can perform as effectively as their younger counterparts.*

Conclusion

The extract below is drawn from a supporting paper that went to Queensland Cabinet in 1991 as an attachment to the Cabinet Submission that considered whether s32 of the Act should contain a sunset provision that would abolish compulsory retirement after two years. This extract aptly outlines why age based compulsory retirement should be removed from the Act and fully abolished in Queensland for all occupations and partnerships currently captured by s32 and s106A.

The abolition of compulsory retirement is unlikely to have any significant impact on the labour market. Hence the issue is largely one of equal opportunity. While the impact is likely to be minimal, to the small minority of workers who choose to continue working after 65 a decision to ban compulsory retirement is extremely important. Similarly there is a large difference between choosing to retire at 65 and being forced to retire. Compulsory retirement is one of the most institutionalised and prevalent forms of age-discrimination. It is based only on chronological age and therefore involves assumptions about ageing and work performance. Research has not only strongly challenged these assumptions, it has shown that older workers are, on balance, as productive as other workers and in fact have more job stability, fewer accidents, and lower rates of absenteeism. Thus it would seem appropriate that the merits of prohibiting compulsory retirement be decided essentially as an issue of equal opportunity, focussing on the dignity and well being of older Australians.^{xxiv}

Therefore, the continued operation of s32 and s106A of the Anti-Discrimination Act 1991 will seriously undermine efforts to eliminate age discrimination in Queensland. COTA Queensland strongly believes it is time to fully abolish compulsory retirement ages in this state.

ⁱ AHRC (2010). Age Discrimination- exposing the hidden barrier for mature age workers.
<https://humanrights.gov.au/our-work/age-discrimination/publications/age-discrimination-exposing-hidden-barrier-mature-age>

ⁱⁱ Thornton, M & Luker, T. 2010. Age discrimination in turbulent times.
https://www.researchgate.net/publication/50854433_Age_Discrimination_in_Turbulent_Times

ⁱⁱⁱ United States Senate. 1977. The Next Steps in Combating Age Discrimination in Employment: With Special Reference to Mandatory Retirement Policy.
<https://www.aging.senate.gov/imo/media/doc/reports/rpt577.pdf>

^{iv} U.S. Equal Employment Opportunity Commission. 2018. The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA).
<https://www.eeoc.gov/reports/state-age-discrimination-and-older-workers-us-50-years-after-age-discrimination-employment>

^v Patterson, Rachel. The Eradication of Compulsory Retirement and Age Discrimination in the Australian Workplace: A cause for Celebration and Concern.
<http://www5.austlii.edu.au/au/journals/ElderLRev/2004/10.html>

^{vi} Mahler, C. Mandate of the Independent Expert on the enjoyment of all human rights by older persons. https://ohchr.org/Documents/Issues/OlderPersons/Statement_Right_to_work.pdf

^{vii} AHRC. (2016). *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*. Canberra: Australian Human Rights Commission. p59.
<https://humanrights.gov.au/our-work/age-discrimination/projects/willing-work-national-inquiry-employment-discrimination>

^{viii} Ibid.

^{ix} Rees, Neil. Rice, Simon & Allen, Dominique. Australian anti-discrimination & equal opportunity law. The Federation Press. 2018. p 467.

^x Queensland Parliament. Anti-Discrimination Act 1991.2020. [View - Queensland Legislation - Queensland Government](#)

^{xi} Anti-Discrimination Bill 1991 - Compulsory Retirement. Office of the Cabinet Briefing Paper Submission No.01705 Anti-Discrimination Bill 1991 – Compulsory Age Retirement)
<https://www.archivessearch.qld.gov.au/items/ITM408834>

^{xii} Ibid. Decision No. 01797.

^{xiii} Anti-Discrimination Bill 1991 - Compulsory Retirement. Office of the Cabinet Briefing Paper Submission No.01705 Anti-Discrimination Bill 1991 – Compulsory Age Retirement)

<https://www.archivesearch.qld.gov.au/items/ITM408834>

^{xiv} Queensland Parliament. 1994. AntiDiscrimination Amendment Act 1994.

<https://www.legislation.qld.gov.au/view/pdf/asmade/act-1994-029>

^{xv} Queensland Parliament. 1994. Anti-Discrimination Amendment Bill 1994. Explanatory Notes.

<https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-1994-119>

^{xvi} Rees, Neil. Rice, Simon & Allen, Dominique. Australian anti-discrimination & equal opportunity law. The Federation Press. 2018. p 467.

^{xvii} Department for Business Innovation & Skills. 2010. Review of the Default Retirement Age: Summary of Research Evidence.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32178/10-1080-retirement-age-summary-research.pdf

^{xviii} ALRC. Access All Ages—Older Workers and Commonwealth Laws. 2013.

https://www.alrc.gov.au/wp-content/uploads/2019/08/whole_final_report_120_.pdf. p 98.

^{xix} Rees, Neil. Rice, Simon & Allen, Dominique. Australian anti-discrimination & equal opportunity law. The Federation Press. 2018. p467.

^{xx} Blackham, Alysia. 2018. Why mandatory retirement ages should be a thing of the past.

<https://findanexpert.unimelb.edu.au/news/5779-why-mandatory-retirement-ages-should-be-a-thing-of-the-past>.

^{xxi} United States Senate. Select Committee on Aging. 1984. The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel. <https://eric.ed.gov/?id=ED252718>.

^{xxii} Leyk D, R  ther T, Wunderlich M, et al.: Physical performance in middle age and Old age: good news for our sedentary and aging society. Dtsch Arztebl Int 2010; 107(46): 809–16.

<https://pubmed.ncbi.nlm.nih.gov/21151416/>

^{xxiii} Kenny, GP. et al. 2015. Age, human performance, and physical employment standards. [Age, human performance, and physical employment standards - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/26111111/)

^{xxiv} Department of Family Services and Aboriginal and Islander Affairs Queensland. Office of Ageing. Resource Paper No 5. The Labor Market Impact of Banning Compulsory Retirement. November 1991. (Attachment to Office of the Cabinet Briefing Paper Submission No.01705 Anti-Discrimination Bill 1991 – Compulsory Age Retirement) <https://www.archivesearch.qld.gov.au/items/ITM408834>