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WORKERS COMPENSATION AND AGE DISCRIMINATION

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### ABSTRACT

As from 8 January 1995 discrimination in relation to age will be unlawful in relation to various aspects of employment practices. Workers can no longer be legally dismissed simply on account of age. The Western Australian Workers Compensation and Rehabilitation Act 1981 contains a number of provisions with age requirements. This paper (which was originally delivered at the Equal Opportunity Commission Conference on Age Discrimination - Implications from Public and Private Sectors in September 1994) explores the extent to which the compensation legislation offends against the spirit of the age discrimination provisions and suggests matters which should be the subject of a report by the Commissioner for Equal Opportunity in Western Australia.

# WORKERS COMPENSATION AND AGE DISCRIMINATION

ROBERT GUTHRIE\*

## INTRODUCTION

The purpose of this paper is to consider whether any of the provisions of the *Workers Compensation and Rehabilitation Act 1981* (WA) discriminate against workers on the grounds of age. The effect of Section 19 of the *Equal Opportunity Amendment Act 1992* (WA) was to enlarge Section 66 of the *Equal Opportunity Act 1984* so as to include specific reference to discrimination on the grounds of age. Discrimination under Section 66 of the *Equal Opportunity Act 1984* can take two forms:

- Direct discrimination - this form of discrimination occurs when a person receives less favourable treatment or is subjected to some detriment because he or she happens to possess a particular attribute. In this context an example of direct discrimination would be a requirement that a worker cease employment when he or she has attained the age of 65 years.
- Indirect discrimination - this form of discrimination occurs when it is established that a member of a group is required to comply with a condition in order to obtain some right or benefit and being unable to comply, is able to establish that the condition was unreasonable and that a substantially greater proportion of those falling outside the group are able to comply. Generally such discrimination appears to have a neutral effect.<sup>1</sup>

The *Workers Compensation Rehabilitation Act 1981* contains a number of provisions which contain age requirements. This paper will deal with four areas where age discrimination can be identified. These areas are:

- a) The cessation of weekly payments under Section 56.
- b) The redemption of weekly payments under Section 67.
- c) The constraints of awards of common law damages under Section 93.
- d) The restriction on representation by legal practitioners under Sections 84Q and 84ZE.

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<sup>1</sup>See generally *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 and also the West Australian response in the case of *Kemp v Minister for Education and Others* (1991) E.O.C. 92-340.



## CESSATION OF WEEKLY PAYMENTS

In Western Australia a worker's right to worker's compensation payments generally speaking ceases on the worker attaining the age of 65. Section 56 of the *Workers Compensation and Rehabilitation Act 1981* provides as follows:

- S56 Subject to the exceptions in Schedule 5, an entitlement of a worker to weekly payments of compensation for incapacity for work resulting from a disability under this Act ceases -
- (a) if the disability occurs on or before the date on which the worker attains the age of 64 - on attaining the age of 65;
  - or
  - (b) if the disability occurs after the date on which the worker attains the age of 64 - on the date one year after disability occurs.

It is necessary to also consider Schedule 5 of the *Workers Compensation and Rehabilitation Act 1981* which provides by Clause 1 and Clause 2 that a worker will in some circumstances be entitled to receive payment after attaining the age of 65 where it can be shown to the satisfaction of the employer or in the case of dispute, to the dispute resolution body that he or she would have continued to work after attaining the age of 65 that payments continue but not beyond the time when he or she attains the age of 70 years.

In any event, the payment for the worker in the above circumstances is a *supplementary amount* only, fixed at \$34.50 in the case of the worker with a dependant spouse and in the case of a worker without a dependant spouse, the sum payable is fixed at \$20.00.

A worker who is entitled to weekly payments and who is aged less than 65 years would be entitled to receive their average weekly earnings for the first four weeks of incapacity and thereafter at the rate equal to the award rate.

Section 56 is discriminatory in a direct sense in two respects. First, payments for compensation are to cease having regard to the attainment of a certain age. Second, payment to a worker who has attained the age of 65 years is less than the payment to a worker who has not attained 65 years.

The cessation of payments at aged 65 years is a feature which was introduced at the commencement of the operation of the *Workers Compensation and Rehabilitation Act 1981*. The repealed *Workers Compensation Act 1912 - 81* did not contain a similar provision. When introducing the Bill to Parliament in October 1981 the then Minister for Labour and Industry, Mr O'Connor, said:

"Members would agree that compensation is intended to assist financially a worker who, through a work caused disability is unable to earn. It is not, and cannot be considered, as a pension in the same nature as Social Services. Workers Compensation is intended as assistance to enable rehabilitation and re-entry into the work force to proceed without financial hardship. By its nature, then, Workers Compensation should cease when the injured worker's earnings would cease through retirement or some other cause. The Bill provides for entitlement to compensation to cease at age 65 years."<sup>2</sup>

In reply when the matter came before the Legislative Council later that month, Howard Olney, QC (now Justice Olney) who led the debate for the Labor Party said:

"The introduction of the 65 year cut-off is something we view with concern. There is a degree of inconsistency in the Government's approach to this aspect. Mr Dunn recommended a gradual phasing down of the prescribed amount after the 65th year to the age of 70. Indeed, the Minister on page 23 of his speech notes, has said that worker's compensation should cease when injured worker's earnings would cease "either through retirement or some other cause. The Government has then selected an arbitrary figure of 65 years, presuming that everyone ceases work at 65. It does not take into account the worker who would work beyond 65 years, not does it take into account the worker who would have retired below the age of 65.....If we still had the formula for weekly payments which applied under the 1973 amendment to the Act, which was introduced by the Labor Government there would be no need for this retirement age to be introduced, because under that Act weekly payments were fixed at the amount the worker would have earned in his ordinary employment had he not been injured. That had been interpreted whereby if it could be shown at a particular time he would not have been working, he did not receive compensation. By the same token, if it were shown that a man over 65 years, who had been injured would have been working had he not been injured, he was entitled to compensation at a rate equivalent to the wage he would have been earning in the work he would have done."<sup>3</sup>

The objections taken to Section 56 are probably even more appropriate given the introduction of the age discrimination provisions in the *Equal Opportunity Act 1984*. Section 66 of the *Equal Opportunity Act 1984* now prevents discrimination on the grounds of age in relation to the following employment situations;

- deciding who should get a job; terms or conditions on which the employment is offered;
- promotion, training, transfer of other benefits;
- retrenchment or dismissal;

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<sup>2</sup>Debates Western Australian Parliament Legislative Assembly, Thursday, 1st October 1981, page 4201.

<sup>3</sup>Debates Western Australian Parliament Legislative Council, 27th October, 1981 page 4841



- subjecting an employee to any other detriment (eg humiliation or insults because of a person's age).

From 8th January 1995 it will be unlawful to dismiss a person simply on the grounds that they have attained a certain age. It follows that there will be increased numbers of persons who will work beyond the age of 65. The rationale for the inclusion of section 56 of the *Workers Compensation and Rehabilitation Act 1981* has been removed by the amendments to the *Equal Opportunity Act 1984* making it unlawful to dismiss workers on the grounds of age.

Under the provisions of the *Workers Compensation and Rehabilitation Act 1981* a worker who attains the age of 65 years and continues to work but suffers a disability will only be entitled to receive compensation where they are able to satisfy the dispute resolution body that they were to continue working and in any event the payment that is received will be less than payments made to younger workers.

## A COMPARISON WITH OTHER STATES

Western Australia is not alone in ceasing worker's compensation payments on account of age. In Victoria under the *Accident Compensation Act 1985* Section 93E provides that a worker's payments will cease when the worker has attained retirement age. Retirement age is defined in Section 4AA as being the normal retiring age for workers in the occupation for which the worker was employed at the time of the injury or the age of 65 years whichever is earlier. It follows that for most workers compensation payments in Victoria will cease on attaining 65 years.

In South Australia under the *Workers Rehabilitation and Compensation Act 1986* cessation of payments takes place after the later of the following dates.

- (a) the date on which the worker attains the age on which the worker would, subject to satisfying any other qualifying requirements, be eligible to receive an age pension under the *Social Security Act 1947* of the Commonwealth;
- or
- (b) the date on which the worker attains the normal retiring age for workers engaged in the kind of employment for which the worker's disability arose or 70 years of age (whichever is the lesser).

The South Australian provision appears to allow in some cases for compensation payments to carry on until the worker is aged 70. It would appear however to contain an inherently discriminatory provision because in some cases payments



will cease because the worker will have attained the age where he or she is eligible to receive an aged pension under the *Social Security Act 1947*. Under the *Social Security Act 1947* women were entitled to the payment of aged pension on attaining 60 years. Men however would only be entitled to an aged pension at 65 years. Note however that recent amendments to the *Social Security Act 1991* provide that the age distinction between men and women will be "rectified" so as to provide women will need to attain the age of 65 years in order to obtain an aged pension.

In Tasmania the *Workers Compensation Act 1988* provides under Section 87(1) for payments of compensation be ceased when the worker attains the age of 65 years. However there is also provision under Section 87(2) for compensation payments to continue beyond the age of 65 years where the worker is able to establish that the terms and conditions of the worker's employment are such as would be to permit him or her to continue in that employment beyond the age of 65 years. Nevertheless it is a benefit which is only conferred upon a worker who attains the age of 65 years after making an application to the Commissioner for Compensation. In that sense the provision is discriminatory because it establishes an additional burden upon a worker who has attained 65 years in requiring an application for continuation of payment.

In the Northern Territory the *Work Health Act 1986* provides under Section 65 that payments shall cease when the worker attains the age of 65 years or if the normal retiring age for workers in the industry or occupation in which he or she was employed at the time is more than 65 years he or she attains that normal retiring age. The Northern Territory legislation does not appear to either reduce payments after 65 years if the normal retiring age is more than 65 years nor requires special application to satisfy that requirement.

Not all jurisdictions contain limitations on compensation payments by reference to age, in some jurisdictions cessation of payments occurs at the expiration of a prescribed (limited) amount of compensation or by settlement at common law.

### **REDEMPTION OF WEEKLY PAYMENTS**

Section 67 of the *Workers Compensation and Rehabilitation Act 1981* provides that a worker who seeks redemption of weekly payments must establish that he or she has attained the age of 55 years or will use the lump sum for a purpose prescribed by regulation. In any event the worker has to establish a special need for a lump sum instead of the continuance of weekly payments. Until November



1993 the age requirement in relation to redemption of weekly payments did not exist.

A very similar provision exists under the *Victorian Accident Compensation Act 1985* (see Section 115).

No age requirements apply under the *Tasmanian Workers Compensation Act 1988* (see Section 89). Commutation or redemption of weekly payments under the *Northern Territory Work Health Act 1986* are not restricted by age requirements (see Section 74).

The effect of Section 67 of the *Workers Compensation and Rehabilitation Act 1981* is to discriminate directly against younger workers who wish to seek redemption of weekly payments.

There is a relationship between Section 67 and 84AA of the *Workers Compensation and Rehabilitation Act 1981*. The intention of Section 67 appears to be to reduce the opportunity for younger workers to obtain a lump sum payment and remove themselves from the compensation system. Section 84AA provides some limited protection for workers in that it requires the employer in some circumstances to provide work for the injured worker so long as they are able to return to work within twelve months of the disability. That the combination of these sections together with the constraints on common law damages (which will be discussed below) generally prevents younger workers from opting out of the compensation system, attempting to focus the worker's attention on rehabilitation. Whether or not these sections are successful remains to be seen. Regardless of the intention of Section 67, its effect is directly discriminatory upon younger workers.

The right of a worker to seek redemption or commutation of weekly payments is dealt with under International Labour Organisation Convention 121, *The Employment Injury Benefits Convention 1964*. It should be noted that this convention has not been ratified by Australia. Nevertheless Article 15 of that Convention provides:

"In exceptional circumstances, and with the agreement of the injured person, all or part of the periodical payment provided for in paragraphs 2 and 3 of Article 14 may be converted into a lump sum corresponding to the actuarial equivalent thereof when the competent authority has reason to believe that such lump sum will be utilised in a manner which is particularly advantageous for the injured person."



Note that Article 15 of the *Employment Injury Benefits Convention 1964* is not conditional upon attaining any particular age. Section 67 of the *Workers Compensation and Rehabilitation Act 1981* would appear to be outside the *Employment Injury Benefits Convention 1964* and directly discriminatory against younger workers.

## CONSTRAINTS ON AWARDS OF COMMON LAW DAMAGES

In 1993 the Western Australian Liberal Government amended the *Workers Compensation and Rehabilitation Act 1981* so as to restrict the ability of injured workers to claim damages against negligent employers for injuries caused in the course of their employment. The restrictions in general terms require that a worker cannot commence proceedings at common law for negligence unless it is established that the worker has sustained a 30% disability to the whole body or has sustained pecuniary (economic) loss in the sum of \$100,000.

The requirement that a worker establish a 30% disability to the whole body appears to have no direct discriminatory effect (at least in terms of age). The requirement that a worker show \$100,000 pecuniary (economic) loss would appear however to be discriminatory in relation to older workers. The calculation of economic loss in general terms is made having regard to the worker's earning capacity at the time of injury and the loss of working life. In general terms it is harder for an older worker to establish the threshold levels of economic loss required before a common law claim can be commenced.

In other words, while the amendments to the *Workers Compensation and Rehabilitation Act 1981* appear to have a neutral application, they do in effect have an indirectly discriminatory affect on older workers. The effect of the amendments is not simply that the worker is precluded from making a claim for economic loss but in addition no claim for pain and suffering can be made nor for other entitlements which may exceed the benefits available under the *Workers Compensation and Rehabilitation Act 1981*.

Incidentally, it is also probably the case that the amendments to Section 93 of the *Workers Compensation and Rehabilitation Act 1981* indirectly discriminates against women. The research compiled by the Australian Bureau of Statistics in it's report, "*Women in Australia*" in 1993 establishes that women are more likely to have part-time employment or casual employment than men and that generally speaking despite industrial changes women's income will be less than men's. It follows that because women's income is less than that of men it will be



more difficult for some women to establish the required threshold economic loss in order to commence common law proceedings.<sup>4</sup>

## CONSTRAINTS ON LEGAL REPRESENTATION

A major feature of the amendments to the *Workers Compensation and Rehabilitation Act 1981* which took effect from March 1994 was the restriction on the right of a worker to be represented in proceedings before the dispute resolution body under the Workers Compensation system.

In relation to proceedings before a Conciliation Officer, Section 84Q of the *Workers Compensation and Rehabilitation 1981* provides that during conciliation a person is not entitled to be represented by a legal practitioner. Likewise Section 84ZE which relates to representation before a Review Officer provides that legal representation is only allowed if all parties agree or where a question of law is raised.

These sections represent a significant departure from the unrestricted rights of a worker to be represented prior to the amendments.

How do these amendments discriminate in relation to age? In relation to younger workers a number of factors are relevant. Younger workers are less likely to be members of Unions than older workers. They are therefore less likely to have access to industrial advocacy. In addition, it has been established that younger workers unfortunately have a greater propensity for injury than older workers.<sup>5</sup> The Government's concern in relation to the incidence rates of injuries for younger workers (those between ages 15 to 24) was highlighted by the special report prepared in relation to those workers in January 1994.<sup>6</sup>

Although the incidence rates of injuries for younger workers was higher, the duration rate of injury was generally speaking lower than for older workers. In other words, whilst younger workers tended to injure themselves more frequently, the period of time they had away from work was generally less than for older workers. Nevertheless it would appear that younger workers have a disproportionately high influence on the number of claims for compensation. It follows that younger workers would be expected to make up a disproportionate

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<sup>4</sup>See generally "Women in Australia" Australian Bureau of Statistics, Canberra, Australia, 1993, Catalogue 411 3.0.

<sup>5</sup>State of the Work Environment - Occupational Injuries and Diseases Western Australian 1992/93 No 13 April 1994.

<sup>6</sup>State of the Work Environment Occupation Injuries to Young Workers Western Australia 1991/92 No 12 January 1994.



number of disputed claims for compensation. Those workers by reason of Section 84Q would not be entitled to representation before a Conciliation Officer and would only be entitled to representation before a Review Officer in limited circumstances.

Given the reduced likelihood that those workers are members of Unions, there is a real prospect that younger workers will be the least informed of all injured workers. They are likely to be the least represented of all injured workers. In that respect there is a real prospect that younger workers are likely to be disadvantaged by their inability to have access to representation at conciliation and review.

The same argument could be applied in respect of non-English speaking background groups and in particular women within those communities. This is so because the effect of Section 84Q and 84ZE of the *Workers Compensation and Rehabilitation Act 1981* is to place greater emphasis upon lay advocacy. The natural source of lay advocacy has been the Trade Union movement. There is generally speaking no other organised source of industrial advocacy available to injured workers. Women are under-represented in the Union movement in that 35% of female employees were Trade Union members as at August 1992 whereas 53% of male employees were members of Unions.<sup>7</sup> Women in non-English speaking background communities are therefore likely to have the double disadvantage of lack of Union support and language disadvantage.

## CONCLUSIONS

Sections 67 and 56 of the *Workers Compensation and Rehabilitation Act 1981* directly discriminate against workers on the grounds of age. The constraints on awards of common law damages and on legal representation are indirectly discriminatory against workers on the grounds of age. Section 66ZS of *Equal Opportunity Act 1984* provides that those provisions will not be unlawful. The provisions of the *Workers Compensation and Rehabilitation Act 1981* are covered by the general exception allowed for acts done under statutory authority. However Section 66ZS(3) of the *Equal Opportunity Act* requires the Commissioner for Equal Opportunity to undertake a review of the written laws of the State and report on those laws that contain provisions which appear to discriminate against persons of a particular age. That report is required to be furnished to the Minister by 8 January 1995.

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<sup>7</sup>See *Women in Australia* *ibid* page 156.

Having regard to the matters referred to above, certain matters should be the subject of a report to the Minister in relation to the provisions of the *Workers Compensation and Rehabilitation Act 1981*.

In particular, the requirement that payments of compensation cease at age 65 seems unreasonable. Such a requirement will be inconsistent with the provision that dismissal on the grounds of age will be unlawful<sup>8</sup> and a continuation of a reduced payment for those over aged 65 is simply unfair.

The requirement that a worker attain the age of 55 years before a redemption can be made is likewise unreasonable where the worker has sustained severe injury and where there is little prospect of rehabilitation. Where the worker is unable to satisfy the special need requirements the limitation on that worker's capacity for redemption is an unnecessary restriction.

The constraints on common law claims and legal representation have been the subject of considerable debate. It should be noted that in some other jurisdictions whilst constraints have been placed on common law claims, access to lump sums for pain and suffering have been retained.

The restriction on a worker's right to representation appears unfair especially in the light of the fact that the employer is entitled to be represented by an insurance claims officer before a Conciliation or Review Officer. In the case of young workers in particular their lack of knowledge of the legislation is likely to be a significant disadvantaging factor.

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<sup>8</sup>See Equal Opportunity Act 1984 (WA) Section 66 and Industrial Relations Act 1988(Cth) Section 170DF



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