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Public Service Association of
NSW Submission to the
Australian Human Rights
Commission

**Willing to Work: National
Inquiry into Employment
Discrimination Against
Older Australians and
Australians with Disability**

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The Public Service Association of NSW (the PSA) welcomes the opportunity to make a submission to the Australian Human Rights Commission 'Willing to Work' Inquiry into age and disability discrimination in employment.

The PSA is the union which represents New South Wales Government and related private sector employees. The PSA is registered under New South Wales and Commonwealth Industrial legislation. The PSA represents around 39,000 members in almost 4,000 worksites spread across NSW, making the PSA one of the largest unions in Australia.

The PSA co-brands as the PSA/CPSU in higher education (TAFE and Universities). As a member of the Community and Public Sector Union (CPSU) /SPSF Group we represent over 180,000 members across Australia.

Our membership covers fields as diverse as care for people with a disability, the power industries, national parks, workers compensation, staff employed in correctional centres, juvenile justice facilities and courts, school and administrative and support staff in NSW public schools, civilian staff in the police service and some employees in statutory authorities and state owned corporations.

Terms of reference

The Terms of Reference for the Inquiry are: the obstacles faced by older persons and persons with disabilities in actively participating in the workforce; discrimination against older persons and persons with disabilities as a systemic problem; the economic and social costs, and the costs to productivity, that result from discrimination against older persons and persons with disabilities in employment.

Introduction

While the Commonwealth Government has stated a desire to keep people in the workplace longer and has increased the retirement age, responses in this survey indicate that employers, including Government employers, may not be putting this ideology into practice.

Conflicting messages are being sent to older workers and workers with disabilities. One respondent spoke of the older workers in their workplace all receiving letters of 'thanks', praising them for remaining in the workplace beyond retirement age. But then some received a letter notifying them that they were redundant on the same day. Clearly a more coordinated approach is needed between the legislature and the executive arms of government.

Despite the increased retirement age, anti-discrimination legislation in both Commonwealth and State jurisdictions and prominently displayed 'equal opportunity employment' policies by NSW Government Departments, discrimination on the basis of age, disability and carer commitments was extensively reported by our members. This feedback was obtained via a survey, which canvassed the views of NSW public servants who are members of the PSA.

There was general sentiment among survey respondents that existing anti-discrimination legislation does not go far enough to ensure protection from discrimination in the workplace.

Firstly, discrimination is sometimes difficult to detect and prove. Many respondents stated that employers and bosses will not admit that the rationale for decisions and actions is discrimination, but will simply find some other excuse to explain away decisions and actions. Secondly, even where discrimination can be demonstrated, the penalties are inadequate to compensate victims and do not penalize sufficiently to deter future discrimination.

While Government Departments have anti-discrimination policies in place, there appears to be a 'disconnect' between policy and practice.

The courage required to exercise one's rights under anti-discrimination legislation against one's employer (particularly if the employee wishes to remain employed) cannot be overstated. Where people attempt to assert their rights under legislation, penalties are frugal and do not reflect the real damage that workplace discrimination does to victims of discrimination. Overt discriminatory behavior, such as bullying on the basis of a protected characteristic also impacts on others who witness the behavior. Many respondents indicated feelings of sadness, shock and fear at seeing bosses not only engage in such behavior, but doing so with impunity where complaints were made but not appropriately actioned.

Despite demographic and attitudinal changes in society and the workplace, legislative instruments, policy and the availability of technology that enables job redesign, many respondents stated a

perception that some employers were still seeking a profile of employee similar to the stereotypical traditional 'standard worker'. This can mean a breadwinner with no responsibilities above work, who is able to be physically present in the workplace, with no need for any adjustment or flexibility, for long hours.

Many older workers express a concern that they are seen as 'behind the times'. However, the failure to harness technology and re design jobs to cater to a more diverse workplace could prove the opposite is the case – that it is employers who are 'behind the times'.

Both the NSW State Government and many private sector employers purport to be seeking the most talented employees in a competitive global market. Incentives to attract the best employees often focus on remuneration. It is rare to see employers publicizing workplace flexibility as an incentive to attract and retain talent, despite the fact that this could be cost neutral and (as will be seen in these survey results) is highly valued by many potential employees.

Methodology

In August 2015 the PSA distributed a survey to 39,000 members, all of whom are employed in the NSW Public Sector.

Both quantitative and qualitative responses were sought to most questions to enable the gathering of statistical information and qualitative data. These survey responses form the basis of this submission, along with case studies of matters dealt with by the PSA.

The survey yielded 1,257 responses.

Summary of Survey Results

- 89 per cent identified as an older Australian, 14 per cent as a carer of an aged or disabled person, and almost ten percent as a worker with a disability.
- Almost 38 per cent of respondents indicated that they (or the person on whose behalf they were submitting the survey) had experienced discrimination in employment on the grounds of disability.
- Around 11 per cent of respondents stated that they had experienced discrimination in employment because they were a carer (for an older person or a person with a disability).
- Only 24 per cent of those who had experienced discrimination took action.
- Of those who experienced discrimination on the basis of age, disability or carer responsibilities, nearly 73% said the experience of discrimination impacted on their workforce participation.
- Over 88% of respondents stated that they believed older Australians, Australians with a disability and those who care for an older person or a person with a disability experience barriers when they look for work, or in the jobs they are in.
- Almost 80% of respondents indicated that discrimination reduces the likelihood of keeping older Australians and Australians with a disability in the workforce.

- Around half the respondents indicated they believed there were practices, attitudes or laws which discourage or prevent equal participation in employment for older Australians and Australians with a disability in the workforce.
- 97% of respondents stated that more flexible working arrangements would assist older workers, workers with a disability and carers of aged and/or disabled Australians to remain in or enter the workforce.
- 28% of respondents had applied for a flexible working agreement at some point, due to disability, aged or carer commitments.
- 25% of respondents were aware of an older worker, person with a disability or carer for a person with a disability who was forced out of a job because they could not access flexible working arrangements.
- Just over 20% of respondents were able to site good examples of workplace policies and practices that assisted in employing and/or retaining employees who are older or have a disability.
- 64% of respondents thought that the experience of age or disability discrimination was different for women.

Actions taken following discrimination and their effectiveness

Of those who had experienced discrimination, only 24 per cent took action.

Why victims do not complain

Research has demonstrated that around 35 per cent of NSW public servants do not believe they would be protected from reprisal for reporting misconduct or wrongdoing¹.

Discrimination and bullying may be difficult to distinguish in the workplace because 'targets' of bullying may not be aware, nor able to prove that they are being targeted due to a protected characteristic. However, there is evidence these groups are more likely to be bullied.²

Respondents who indicated having a disability or carer obligations were also less likely to agree that age and disability were not a barrier in their organisation³.

Those with carer responsibilities were also less likely to agree than those without carer commitments that the workplace provided adequate flexibility and assisted them in achieving work-life balance⁴.

¹ NSW Public Service Commission, People Matter Employee Survey 2014 (<http://www.psc.nsw.gov.au/reports---data/state-of-the-sector/people-matter-employee-survey/people-matter-employee-survey-2014>) at 20

² Ibid 1

³ Ibid 1

⁴ Ibid 1 at 45

Outcomes of complaints

Of those who did have the courage to raise concerns about discrimination, the outcome was usually less than positive.

Of those who raised discrimination issues with their supervisors, only one respondent reported being able to resolve the situation themselves through discussions. All other respondents who attempted to resolve the problem by discussions with their supervisor reported negative outcomes, ranging from their endeavours being “not effective”, to reporting that supervisors were not aware of anti-discrimination, through to being victimised after raising discrimination issues.

Some of the victims of discrimination reported eventually being dismissed and/or “forever scarred” both by their experiences of discrimination, as well as the way their complaints were dealt with by employers.

Some complainants reported that their complaints were simply ignored.

Most of those lodging the matter with a tribunal lodged their matter with the NSW Anti-Discrimination Board. While most applicants did not receive everything they asked for, all stated being reasonably satisfied with the outcome.

One major challenge to carers that is afforded negligible, if any, protection under current instruments is the issue of workplace relocations. Many carers reported complete upheaval when their jobs were relocated. Proper consideration is rarely given to the possibility of working remotely, either from home or from some other location, such as another Government office building. Attempts to resist this have thus far yielded little result (despite the compassion expressed by tribunals and the Courts)⁵. Some respondents in this survey indicated that sometimes the new work location did not provide the facilities and services needed for the worker with a disability or the person they care for and that the forced relocation isolated them from their existing support networks and the facilities and services they were accustomed to using.

This survey (and other research)⁶ suggests that only around one quarter of the people who have experienced discrimination in the NSW public sector workplace actually make a complaint, due to a lack of faith their complaint will lead to a successful outcome.

The experiences of others who have complained indicate that their concerns are justified.

Impact of discrimination on workforce participation

Of those who experienced discrimination, almost 73% said the discrimination impacted on their ability to participate in paid employment.

One respondent reported feeling too afraid to ask for a flexible working arrangement or any reasonable adjustment in case this resulted in bullying or job loss. While the respondent did not elaborate on why they thought this may happen, the PSA has assisted a number of members who

⁵ *Gardiner v New South Wales WorkCover Authority* [2003] NSWADT 184

⁶ *Ibid* 1

have been bullied after applying for flexible working arrangements and/or other forms of reasonable adjustment. A detailed example of this is a matter recently heard by the Federal Circuit Court⁷, where an application for flexible work/reasonable adjustment (working from home on occasion) due to a disability was the catalyst for bullying. Sadly, this scenario is not an isolated example. Where others in the workplace witness such incidents, or hear about them, fears are rational and justified.

A number of respondents reported using their leave, including sick leave and long service leave, to cope with their disability or meet carer obligations and remain in the workforce because they had been lead to believe that reasonable adjustment (including flexible working agreements) was not available. Alternatively, they believed their application for reasonable adjustment would not be approved, or they feared even requesting flexible working arrangements/reasonable adjustment. A few respondents reported difficulty accessing carer's leave or family and community service (FACS) leave.

It is difficult to understand the reluctance to grant reasonable adjustment, particularly flexible working agreements, since employees are only paid for the hours they work, meaning many of these should be close to cost neutral for organisations. Such accommodation could also result in increased loyalty, improved productivity and higher morale⁸. Further, employees using leave to cope with their situation is foreseeable, and the organisation effectively bears the cost of this leave where reasonable adjustment (including flexible working agreements) are denied or made difficult.

The refusal of reasonable adjustment and flexible working arrangements results in a cost for organisations as well as the individuals impacted by such refusal.

Some respondents reported leaving jobs where they had experienced discrimination as soon as they were able to find another job – one did so after exhausting all leave. Apart from the loss of organisational knowledge, this leads to increased costs for organisations by way of additional (and avoidable) recruitment and training costs.

Where victims of discrimination stayed in their jobs, some reported difficulty doing so. These experiences differ according to the person's circumstances and the nature of the work. For example, one respondent reported ongoing difficulty completing tasks and accessing information due to vision impairment.

Other problems occur when medical advice is interpreted, often without consultation. One example dealt with by the PSA involved an employee with a parking sticker for a person with a disability being told by her supervisor that she was not allowed to use the disabled parking space at work because she (the supervisor) did not believe the nature of her disability justified this and that she had to "park elsewhere". She was also bullied by colleagues.

The impact of discrimination on individual victims can be devastating. Beyond completely preventing the victims participating in the paid workforce, one respondent stated that, after losing their job they felt "traumatised", their skills had become out of date, they had become socially isolated, and both their physical and mental health had deteriorated. Financial hardship from job

⁷ Huntley v The State of NSW, Department of Policy and Justice (Corrective Services NSW) 2015

⁸ Baird M, Evesson J, Oxenbridge S, Advancing Women: Increasing the participation of women in senior roles in the NSW public sector, University of Sydney Business School, 2014

loss left one respondent homeless. Another respondent reported not being able to feel safe at work or trust supervisors again due to previous victimisation.

A few respondents reported developing depression and/or anxiety disorders following victimisation.

One respondent who took the initiative and retrained by undertaking another degree in their late forties, spoke of the difficulty of raising three children with special needs while attempting to study full-time.

Training, and equitable access to training is integral to ensuring all employees can contribute to their full potential. Many older respondents indicated that they felt they were being overlooked for training opportunities on the assumption that, due to their age, they would not be in the workplace long enough for the employer to recoup the benefits of any training.

A few older workers stated that they had not experienced any discrimination. These were a very small minority.

Barriers

Over 88% of respondents stated that they believed older Australians, Australians with a disability and those who care for an older person or a person with a disability experience barriers when they look for work and in employment.

Attitudes

Many respondents believed there was a prevailing mentality that older workers are “unable to learn quickly”, are “slow”, “inflexible”, “fixed in their ways”, and are “not good with technology”. The term “dead wood” was used by one respondent to state the way they believe older workers are perceived in the workplace.

Some also stated that the assumption that older workers would not want to work much longer seemed to factor into promotional and hiring decisions.

Older respondents who were either re-entering the workforce or attempting to change jobs indicated they had experienced difficulty in doing so. One respondent who was attempting to enter another line of work believed interviewers seemed to be looking for a narrow skills set and regarded her as a “one trick pony”, that is, only able to do the type of work she had done previously and appeared to doubt her ability to learn new skills.

The desire for a ‘fresh looking’ organisation

Roles described by respondents as “frontline”, such as customer service roles, seem to be an area of particular concern. One respondent spoke of being overlooked for a customer service role, despite twelve years of experience in similar roles. When the applicant queried whether age was a factor in the decision making process, this was denied - despite not one person hired for any of the roles being over fifty.

One respondent indicated that some workplaces seem to want a certain ‘look’ to the business unit, a ‘fresh look’ that motivates hiring of younger employees, and that employers “don’t want a geriatric looking office”. This was mentioned by respondents as a particular problem for older women.

Other respondents noted that older women do not feature in the NSW Governments current jobs website, possibly confirming that an older woman is not quite the 'look' they are after for the sector.

No mechanism for merits based appeals

The new Government Sector Employment Act 2013, (GSE Act) removes the ability for employees in the NSW public sector to challenge promotional decisions on the basis of merit. Under the previous legislation⁹, employees had a right of appeal on merits to the Government and Related Employees Tribunal (and later to the Industrial Relations Commission). Now employees can only appeal on procedural grounds. The Act also limits such appeals to an internal review (this provision is yet to be tested).

Tight job market

Some respondents indicated a belief that, with jobs currently so scarce, employers can "do as they please". This adds weight to the need for some form of transparent, independent/external merit based, appeals mechanism.

Lack of reasonable adjustment

Some respondents stated that reasonable adjustment and flexible work agreements were seen as "tricky" or "inconvenient" and employing young able bodied workers is seen as an easier option. This view reflects matters dealt with by the PSA. It may be that the administration of reasonable adjustment, flexible working arrangements in particular, is not a part of their training as managers. An example of this was a female member, a shift worker, who required a part time work agreement to care for a disabled partner. The manager stated "if I approve this, what can you put on the table". The member was forced to work more hours than she was comfortable with in order to 'put something on the table' and have the application approved.

Complaints about inflexibility, job design and working hours (especially shift work) were common themes among respondents. Some voiced concern over long working hours generally.

Ignorance and prejudice

General ignorance and outright prejudice was also identified by one respondent as a major barrier:

There is "a mistaken belief that physical disabilities are an indication of an individual's cognitive abilities or level of intelligence...Most barriers have to do with attitude and ignorance and an unwillingness to go that one step further to embrace difference and look beyond the disability to acknowledge the skills, talents, experience and knowledge which individuals with disability have to offer".

Many respondents with a physical disability stated they were often treated and spoken to as though they were also intellectually impaired. There appeared, on the basis of the responses, to be some form of unconscious bias in operation, where interviewers, bosses and colleagues equated physical disability with a corresponding degree of mental impairment. Some respondents believed there was a presumption that those with a physical disability would not be capable of performing at the same standard as other employees.

⁹ Public Sector Employment and Management Act 2002

Inadequate investment in assistive technology

Respondents with a physical disability indicated that the barriers began not in the workplace, but at the initial point of application and interview. One indicated that, in their experience, NSW government employers did not have appropriate assistive technology available to enable job applicants with a disability to apply on a 'level playing field'. Many respondents in employment indicated a general concern about lack of appropriate facilities generally for older people and workers with a disability, as well as antiquated job design.

Unconscious bias

Older respondents also indicated encountering a degree of bias early in the job application process. One respondent stated that the body language of the interviewers indicated s/he was "not what they had expected". The respondent also indicated that this was especially disappointing when the job application process is now so detailed and time consuming that much time and effort is put in just to make it to the interview stage.

Bullying and victimisation

Many respondents complained that their job applications were culled and suspected this was on account of their age. While an employer cannot ask about an applicant's age, many respondents said they believed employers circumvented this simply by using the date of birth, which must be provided as part of the application.

Many respondents indicated that victimization was commonplace, and even institutionalized within the NSW public sector workforce. Some respondents cited instances of workplace violence, where the victims were targeted on the basis of protected characteristics, such as age or disability (including mental health issues).

Workers compensation

Anomalies in the workers compensation system were also a concern for a number of respondents, who expressed concern at not being covered by workers compensation when working past retirement age. This raises many questions. While the Commonwealth government wants Australians to work longer, the responses in this survey indicate that those who attempt to do so suffer discrimination, ridicule, victimization and inadequate workers compensation coverage in the event they are injured at work.

Training

The changing nature of the workplace, including the introduction of new and rapidly changing technology, was acknowledged by some respondents as creating a barrier for older workers – and the lack of training provided by employers when implementing new technology was lamented. Some respondents indicated employers may see the provision of training and retraining as "too hard", (as with reasonable adjustment).

While retraining may be necessary, particularly where people have been out of work for lengthy periods, retraining as an adult sometimes presents unique problems.

The cost of not assisting persons in this situation back into employment will ultimately have a higher social cost. For instance, long term unemployment benefits, healthcare costs and housing. This raises the need for some form of specialised training and support program for older workers who find themselves unemployed due to restructures, redundancies and downsizing.

Discriminatory behavior does not escape the attention of ‘onlookers’. Some respondents stated that, while they themselves had not experienced age discrimination first hand, they had noticed older workers being overlooked for opportunities in the workplace and believed this was due to age.

Respondents who worked in manual jobs (for example Correctional Officers and laborers) expressed particular concerns about how they and others would be able to work until 70.

Flexible Work

97% of respondents agreed that access to flexible work arrangements (including part-time, work from home, preferred rostering, job sharing, career breaks, part year employment, more flexible hours and additional leave) would assist older workers, people with disabilities and carers or older people or those with disabilities to remain in the workforce or to enter the workforce.

28% of respondents indicated that they had applied for a flexible working agreement at some point, due to disability, age or carer commitments.

Despite published policies on the availability of flexible working arrangements and claims by NSW Government Departments that they are equal opportunity employers, the outcomes detailed by respondents demonstrates these arrangements are little more than rhetoric in some Departments.

“...asked for part-time and was told that the only way they can give me part time is if I signed a paper to retire in a year and to use the long service leave for the other days of the week. I refused so I remained in full time”.

Respondents told of arrangements being approved for short definite periods only, of having to endure lengthy negotiations in order to have applications approved, of having to provide copious documentation- often repeatedly- to support requests. But there was usually no corresponding requirement for managers to detail the reasons for their decision where the application was refused. One respondent’s application was denied and the reason stated was simply “managerial discretion”. Many respondents spoke of arbitrary refusals, of being victimised after requesting flexible working arrangements, and of the process itself (especially with work from home agreements) being so complex and detailed that it was not worth the effort.

Some who were successful with part time applications reported a minimal adjustment in workload – meaning they were doing almost a full time workload for part time pay. Some spoke of the employer attempting to medically retire them after they disclosed a disability. Others gave up because the process was too difficult or because they did not receive any response to applications. Another concern was being denied training and higher duties due to being part time.

Many respondents, even those in serious situations (such as caring for dying relatives), did not apply because they had witnessed others who had applied having applications denied and being bullied after they applied for a flexible work agreement, and were fearful this would happen to them.

It is difficult to ascertain the reasons for the difficulties employees in the NSW public sector have with obtaining flexible working agreements, but many of the problems may stem from a lack of understanding about policies (including those of their own Departments), Award provisions and

legislation in respect of flexible work generally. It may also be unclear as to who has responsibility to negotiate flexible work arrangements.

Several respondents stated that employers were under the impression that the only people who were 'eligible' for flexible working arrangements were those returning from parental leave.

Some respondents stated they had "not even tried" to access a flexible working arrangement because their "current workplace does not allow this". This demonstrates the need for education around flexible work policies for both employees and managers.

A small number reported having been threatened with dismissal if they did not return to full time work.

Permanent part time work seems particularly difficult to obtain. As stated previously, many of those who are successful in obtaining part time work are only approved for limited periods and had to resubmit a new applications to continue the agreement. Many find this frustrating as they are often resubmitting the same information and have no intention of ever returning to work full time.

Shift workers appear to fare the worst in the area of access to flexible work. Again despite many Government Departments having both published policies on flexible work and detailed written procedures for implementing this in shift work environments (including set shifts, job sharing, having set days off and part time arrangements), many shift workers reported being told that being available 24/7 is in their "job description". Another example is someone requesting less night shifts in accordance with the recommendations of a medical practitioner, being told to "leave if (they) couldn't do the job". These arbitrary refusals occur despite the fact that such arrangements have the potential to reduce absenteeism.

Around one quarter of respondents were successful in having their application for flexible work approved. While this is far too few, almost all who were successful in negotiating flexible working agreements communicated that they were extremely satisfied with their situation.

Where requests for 'adaptive technology' were submitted, respondents reported a battle to have these granted.

In relation to both reasonable adjustment and flexible work (or both), where respondents recognised that they had been treated unfairly and chose to lodge a grievance, not one single outcome was positive. One respondent reported being subjected to internal disciplinary action by their immediate supervisor after lodging a grievance.

Arbitrary refusals of applications for flexible working agreements often featured simple, blunt 'explanations' such as "operational priorities" or "business grounds". The lack of a proper reason may be indicative that they have not bothered to properly consider the request. While managers can decline applications for flexible working arrangements on business grounds, genuine reasons for refusal must exist.¹⁰ This is particularly concerning in this survey because, due to the focus of the survey (discrimination) many of these applications were likely made due to characteristics protected under both state and Commonwealth discrimination legislation. Hence, a refusal to consider such an

¹⁰ Mayer v Australian Nuclear Science and Technology Organisation [2003] FMCA 209

application may be a refusal to make or consider reasonable adjustment as well, since the request may in fact be a request (or part of a request) for reasonable adjustment¹¹.

Some respondents indicated that accessing Family and Community Service Leave (FACS Leave) to care for family members was also often difficult. The specific problems noted were being 'cross examined' by bosses about why they needed the leave and concerns over the supporting documentation requested by superiors. Some respondents perceived the latter as a breach of privacy, as they are essentially disclosing the medical issues of a third party to their organisation, in order to justify leave which is in any event deducted from their own leave balance. The recipient of the care is likely not aware and/or may not have legal capacity to consent to this information being released. A notable example dealt with by the PSA recently, was from a male member who, when requesting leave to care for his child, was asked by his boss "why can't your wife do it"? He was subsequently asked for not only medical information about his child, but a written explanation as to why his wife could not provide the care.

Lack of flexibility for shift workers

Shift work was an issue that was raised by many respondents as a barrier to participation.

While most NSW Government Departments now publish policies about 'flexible work practices' on their websites and intranet, many respondents indicate this is little more than rhetoric. Many respondents indicated difficulty accessing reasonable adjustment (including flexible working arrangements) and one indicated that information about working from home appeared to be kept especially well hidden. Again, this is reflective of the matters the PSA deals with on a regular basis, including arbitrary denial of flexible work applications. When looking at member complaints about accessing flexible working arrangements (raised with the PSA in the preceding two years), all except one of the agencies involved proudly display flexible work practices policies, and all claim to be equal opportunity employers. With regard to reasonable adjustment and/or flexible working arrangements, there appears to be a disjuncture between policy and practice.

When respondents discussed the responses from their bosses in relation to applications for flexible working arrangements, a consistent theme emerged: an "uncaring" and "unsupportive" attitude from bosses and supervisors for employees who needed time off or flexible arrangements.

Current leave entitlements were also mentioned by some respondents as "inadequate for balancing personal/family" commitments with work commitments.

Of those who were fortunate enough to find part time work or some form of flexible working arrangement, it appears this may stifle future progression. Respondents who worked part time spoke of being overlooked for acting opportunities (usually with the explanation that the work required someone "full time"), and also being overlooked for training opportunities. These stories are familiar to the PSA and supported by research¹².

The lack of part time work available was raised as a concern, with some respondents indicating they would prefer to work part time and remain in the workforce longer, as opposed to retiring. These concerns are supported by the lack of advertised part time positions on the NSW Government

¹¹ Huntley v The State of NSW, Department of Policy and Justice (Corrective Services NSW) 2015

¹² Baird M, Evesson J, Oxenbridge S, Advancing Women: Increasing the participation of women in senior roles in the NSW public sector, University of Sydney Business School, 2014

website. Further, most of the 'part time' positions advertised are actually casual or temporary positions that are available on part time hours, not secure part time positions, which appears to be what respondents are seeking (reduced hours and/or flexibility with job security). Most of the so called part time work advertised is actually temporary or casual employment.

The approval of flexible working arrangements appears to rest largely with the immediate supervisor or manager. One example of this was a respondent stating the application for part time or job share had been declined simply because "my manager wanted it filled by one person full time" with no further consultation, explanation or investigation about how the job could be redesigned. Further evidence of the degree to which the personal preferences of individual managers affect the outcome of applications, is that several respondents had flexible working agreements in place which worked well, only to have these 'terminated' when new managers took over.

Currently the course of least resistance for a manager who does not wish to put time and effort into negotiating flexible work arrangements or reasonable adjustment is simply to refuse or ignore the request. The onus needs to shift to create circumstances where the course of least resistance is to support such requests where possible.

Many respondents observed that access to flexible working arrangements are "currently being curtailed". This corresponds with a recent increase in member enquiries handled by the PSA around flexible working practices.

Being forced out of the workforce

Over one quarter of respondents were aware of an older worker, person with a disability or carer for a person with a disability who was forced out of a job because they could not access flexible working arrangements.

Sometimes it appears that requests for reasonable adjustment and/or a flexible working agreement is the catalyst for a medical assessment, with a view to possible medical retirement.

Again, shift workers appeared to fare particularly badly, with requests for certain shifts being flatly refused. For shift workers, the situation extended beyond denial of applications for preferred shifts. Many spoke of having been rostered on days or shifts they had asked not to work more often after they had asked not to work them, and of having been given rosters that appeared to deliberately inconvenience them. If such workers have a disability that necessitates medical appointments at certain times, or carer commitments, a worker in such a situation may be left with no option but to resign – perhaps after using all available leave.

Many respondents noted that, in their observation, a disproportionate number of people 'let go' in recent restructures within the NSW public service were employees who were older, or who had carer commitments that required flexible working arrangements. One respondent noted that, just prior to these restructures, the NSW Government publicly stated that "NSW has the oldest public service in Australia". Another respondent gave an example of a colleague with a speech impediment, saying "it was obvious managers were uncomfortable dealing with her". Her position was deleted during a restructure.

These observations correspond with official figures. The number of people with disabilities employed in the NSW public sector has fallen from 4.8 per cent in 2009 (prior to the restructuring of

the NSW public sector) to just 2.9 per cent¹³ – the lowest level in a decade. The largest decrease in the past year was in the NSW Public Service Commission (down from 7.6 percent in 2014, to just 3.8 percent in 2015), the agency charged with “build[ing] best practice models for workforce management and driv[ing] the implementation of these at the NSW public sector, cluster and agency level...” and “leading the NSW public sector in the transformation of culture. Assisting NSW public sector agencies to properly reflect the NSW public sector core values”¹⁴.

Respondents also expressed concern at seeing colleagues “shown the door” as a result of workplace injuries that only required reasonable adjustment. While most were physical injuries, one spoke of a colleague who was diagnosed with PTSD from dealing with fatalities. He was refused the less stressful duties he had applied for.

One respondent gave an example of a colleague being forced to resign because he required regular breaks due to mental health problems. The request for the additional breaks was denied by a supervisor who took many breaks each day to go outside and smoke.

Some respondents also spoke of witnessing colleagues with a disability “harassed into leaving” because of their disability. However, one respondent told a ‘success story’ in assisting a colleague in a wheelchair who had been denied an application to work from home on rainy days as the rain could interfere with the operation of his electric wheelchair. He successfully assisted his colleague in getting approval to work from home on rainy days.

A disproportionate number of carers forced to resign appear to be responsible for the care of older parents (including those dying) who have been flatly denied any form of flexibility. This inflexibility includes both hours and locations of work. One respondent told of a colleague with carer commitments who applied for a position in the recent restructures. There were three locations available. She advised she could work at any of the locations except Parramatta (in case she was needed in an emergency) and preferred the CBD location. She was only offered a position in Parramatta despite roles being vacant in the CBD.

Many respondents also spoke of seeing colleagues sent for medical assessments and subsequently medically retired when they had been diagnosed with fairly minor problems (examples included depression and anxiety). One also spoke of witnessing a colleague being harassed by the Department’s “so called Health and Wellbeing Officer” after being referred there for ‘support’.

Some respondents spoke of seeing colleagues who required reasonable adjustment or flexible working arrangements ‘back down’ and suffer in silence when managers threatened them with a medical assessment and/or medical retirement if they pursued the matter.

A few respondents expressed the sadness they had experienced after seeing older colleagues who had been good mentors to younger workers forced out of the workplace.

¹³ *State of the NSW Public Sector Report*, NSW Public Service Commission, 2015.

¹⁴ NSW Public Service Commission <http://www.psc.nsw.gov.au/about-us>

Economic cost of discrimination for organisations

Some respondents indicated using large amounts of sick leave, as well as other leave, either because they were unable to access flexible working arrangements, or because they were victimised in the workplace and this led to stress.

Where employees leave the workforce, there is a cost to the organisation in replacing the worker through recruitment and training.

While some forms of reasonable adjustment represent a cost to organisations, others are either cost neutral, or potentially even a cost saving to organisations who are willing to 'think outside the square' and implement them, such as flexible work and work from home.

Employees who are willing to work from home potentially save the organisation the cost of additional office space, IT equipment and utilities (water and power). Unquantifiable benefits also exist for organisations in terms of improved morale and potentially reduced leave¹⁵. Working from home may also deliver greater efficiencies from a reduction in interruptions. Noise and interruptions are particularly problematic in some open plan offices, and this has been demonstrated to reduce productivity¹⁶.

Equal Opportunity Employers

Of the NSW Government Departments about whom discrimination complaints have been made by members, every single one publishes information indicating they are an equal opportunity employer. A number of these have been the subject of repeated complaints. The discrimination is not limited to the individual colleagues or supervisors within the organisation, because in some instances endeavours to resolve matters at a senior level through negotiation were also unfruitful. This indicates an organisational culture that is not what would be regarded as an 'equal opportunity employer'. All continue to assert, with impunity, that they are 'equal opportunity employers'.

There appears to be no necessity for an employer to substantiate a claim that they are an 'equal opportunity employer' beyond perhaps having some policies to that effect. At present, it would appear that anyone can state they are an equal opportunity employer. All that is required is a statement that they do not discriminate, or perhaps a policy document around this.

For an organisation to hold itself out to be an 'equal opportunity employer', some benchmark should be met. This benchmark should focus on actual results, including the actual diversity within the workplace and the number of applications for reasonable adjustment or flexible working agreements and the 'approval rate', not merely the existence of aspirational policy documents (with no practical application).

Proper certification should apply for employers who want to call themselves 'equal opportunity employers', with an associated licensing fee to a certifying body.

This would be a promotional opportunity for some organisations.

¹⁵ Baird M, Evesson J, Oxenbridge S, Advancing Women: Increasing the participation of women in senior roles in the NSW public sector, University of Sydney Business School, 2014

¹⁶ De Dear, Richard, Journal of Environmental Psychology, Volume 36, December 2013, pp 18-26.

Discrimination and keeping older workers and workers with a disability in the workforce

Almost 80% of respondents indicated that discrimination reduces the likelihood of keeping older Australians and Australians with a disability in the workforce.

Practices, attitudes or laws which discourage or prevent equal participation in employment for older Australians and Australians with a disability

Around half the respondents indicated they believed there were practices, attitudes or laws which discourage or prevent equal participation in employment for older Australians and Australians with a disability in the workforce.

Disconnect between policy and practice

The disconnect between policy and practice (noted elsewhere in this submission) did not escape the attention of respondents, with many commenting that Departments put out “*statements...but they never publish any evidence that demonstrates they walk the walk*”.

“my workplace has all the right sounding policies but unfortunately good practice comes down to the empathy and understanding of individual managers”

Regrettably, in some instances, even after the relevant legislation or policy is brought to the attention of those responsible for its implementation, resistance is sometimes still encountered. This is especially true for indirect discrimination. A common example is the misunderstanding that all shift workers must always be available 24/7 and if they cannot, irrespective of the reason, they are not fit for duty.

Inadequate penalties and compensation for discrimination

The PSA has often been left with no alternative but to file discrimination matters with an appropriate tribunal. These matters are resource intensive to run. Further, where some form of monetary compensation is awarded to individuals, this amount is insignificant in light of the budgets of Government Departments. The small penalties may suffice as a deterrent for small businesses, individuals or not for profit organisations, but the small sums awarded in most discrimination matters are not likely to be missed by Government Departments. Evidence of this is the fact that complaints of discrimination continue to come from members working in Departments against whom the PSA has previously lodged discrimination complaints in tribunals. For the victims of discrimination, the sums awarded as compensation also do not, in our view, adequately compensate them. This is especially evident when compared to damages in other areas of civil law, such as defamation¹⁷.

¹⁷ *Ettinghausen v Australian Consolidated Press Limited* [1991] 23 NSWLR 443. Rugby league player Andrew Ettinghausen sued in defamation for imputing he'd permitted a photograph to be taken of his genitals, when the magazine published some footy players in the shower after a match. He was awarded \$350,000 (reduced to \$100,000 on appeal).

Many members who initially complain to the PSA, choose not to pursue their claims, even with the support of the union, due to fear of repercussions and the stress involved in asserting their rights. Unless penalties for discrimination are adequate to compensate victims and send a clear message to employers, this situation is not likely to change.

One respondent described anti-discrimination legislation as “toothless” on account of the often covert nature of the act and the inadequate penalties for perpetrators.

Discrimination that is difficult to prove is not always covert. One respondent told of a 73 year old colleague who was called into an ‘ambush meeting’ (where an employee is called into a manager’s office without notice or support, often with more than one manager waiting in the office) where her manager told her she was “a liability” to the Department on account of her age. Where employees attempt to take action, it is their word against the manager (or managers).

Access to merit based appeals

The Government Sector Employment Act 2013 (the GSE Act) abolished merits based appeals for promotional decisions. Despite the Rules accompanying the GSE Act dedicating an entire Part to the notion of ‘merit based employment’, the Act, the accompanying Regulations and Rules make no provision for an appeal on merits. NSW public servants can only appeal on procedural grounds. Further, the GSE Act limits these appeals to internal appeals.

While utilising anti-discrimination legislation is still technically an option, discrimination is often subtle and covert, making a claim difficult to prove. Further, the desired remedy (employment in the respective position) may not be available. Merits based appeals to an industrial tribunal used to enable an applicant to be appointed to the respective position, provided they could demonstrate they were the most meritorious applicant.

Only a merits based appeal process with an independent arbitrator with the power to make an order for employment can guarantee justice to victims of discrimination in hiring and promotional decisions.

Recruitment

Problems with recruitment procedures were also raised, including concerns of unconscious bias, with “like recruiting like”.

One respondent stated that (since the abolition of merit based appeals in the NSW public sector), *“recent recruitment has been done under a veil of secrecy...where the opportunity to discriminate exists...it will happen...my employer even talks openly of ‘cultural fit’, ie I will employ people I like”*.

Another respondent commented that anti-discrimination policies can actually function as a protection to employers who do discriminate, since this creates an appearance of having ‘ticked the box’ in the discrimination area. They can then find any excuse for not having selected the candidate that is older/disabled/a carer.

The practice of checking an applicants’ sick leave when making promotional decisions was raised as an area of concern. Some Departments apparently go as far as counting all ‘unscheduled absences’ irrespective of the leave utilised. While it may technically be possible to challenge this as discrimination, the best way would be via an independent external merits base appeals mechanism.

Some respondents were in favour of quotas and affirmative action in the NSW public sector because ***“the public sector does not lead by example”***.

Where the victims of discrimination opt to ‘move on’ and apply for other positions, some expressed concern over the requirement (in the NSW public sector job application process) of needing to have a supervisor as a referee. This may leave some victims – particularly those who have been in the same workplace, or small workplaces, long term in a position where they have to ask the discriminator to be one of their referees.

Medical assessments

The problem of medical assessments was raised by some respondents, particularly the degree of independence. The examinations are initiated by the employer, paid for by the employer, and what information is provided to the examiner is largely determined by the employer. Further, some employers, subsequently take it upon themselves to ‘interpret’ of the medical advice unless they are challenged. A cogent example of the potentially unscrupulous use of medical examinations was extensively documented in the case of *Huntley*.¹⁸ Sadly, *Huntley* is probably not an isolated instance. The PSA receive regular enquiries from members about medical assessments and/or medical retirement. Respondents in this survey, as well as member enquiries generally, express concern over the level of independence of the process.

Organisational culture

Organisational culture was also raised as a concern: ***“Whilst EEO policies are in place in all Government departments, it doesn't stop practice and attitude. Therefore, leaders continue to selectively groom chosen staff for advancement...There are multiple layers of executive that would rather protect the status quo, than stand up for what is a legal and moral obligation to behave ethically within the workplace codes of conduct. Older Australians, Government Employees or not, are becoming marginalised not only by the young, but by those in higher positions wanting to bequeath a particular way of business to the next generation”***.

One only need look at the treatment of whistle blowers (for example, NSW public servant Tara McCarthy) for evidence that justifies the concerns of this respondent. Another respondent stated, along similar lines, that: ***“in the Public Sector, there is clear attitude of always accepting the status quo and maintaining the culture of complete control. Anybody who looks, acts or thinks differently is isolated, bullied and harassed”***.

Restructures

Restructures were mentioned by a number of respondents, who expressed concerns that these were used as a chance for employers to ‘squeeze out’ older workers or workers with a disability.

Skilled migration

The Commonwealth Governments’ skilled migration policies were called into question by one respondent, who could not understand why this is necessary when there are so many older workers willing to work and retrain, but unable to find work.

¹⁸ *Huntley v The State of NSW, Department of Policy and Justice (Corrective Services NSW) 2015*

Another respondent stated that, In light of the ‘tight’ employment market, employers should not only have to demonstrate there is a skills need, but that it is not possible to train an Australian to do the role.

There were calls for dedicated funding to be made available to train older Australians and those with a disability to address skills shortages, instead of relying on skilled migration.

Disciplinary procedures and performance management

Disciplinary procedures and performance management in the NSW public sector were both cited as examples of practices that enable “*reasonable management practices*” to discriminate and victimise by imposing the practice in a ‘tailored’ way upon a ‘target’ selected on the basis of a protected characteristic. These processes enable “*the system*” to discriminate and victimise “*with the full backing of the system and legislation*”. Sadly, one of the respondents who raised concerns about discrimination and victimisation being cloaked in the garb of “*reasonable management action*” was an aged worker and veteran who has a disability from serving their country overseas.

Workers compensation

Workers compensation was raised as a concern on a number of grounds and was a strong theme in survey responses. The first problem is that those who work past retirement age are not covered by workers compensation insurance if they are injured at work. Where workers are covered, the short duration of coverage, combined with the decreased income they receive while on workers compensation was stated as a reason workers return to work before they are actually ready to do so. Experiences with the workers compensation insurer was also a matter of concern for some respondents. Some stated that they, or a colleague, had become depressed or developed anxiety not due to the work injury, but due to the nature of the dealings they had with the workers compensation insurer.

The PSA has dealt with a number of member issues independent of this survey, where the members have been entitled to access workers compensation but have elected to use their sick leave instead, either due to past dealings with the insurers or because they had heard from colleagues how difficult it is to deal with the workers compensation insurer. The use of sick leave in this instance represents a cost transfer from the insurer to the employer (i.e. the tax payer where the employer is the government).

Respondents also raised the fact that a workers compensation claim haunts them forever, even if they have fully recovered. There is a requirement to disclose to future employers any previous workers compensation claims. Respondents felt this was discriminatory and an invasion of privacy.

Superannuation – “the one size fits all preservation age”

Superannuation legislation was an issue for some older workers who wished to retire and could afford to. One respondent stated they had sufficient superannuation to retire, but was unable to do so because they had not reached the preservation age. This respondent was keen to retire due to frustration at seeing applicants with less merit chosen for promotion, but is effectively mandated to remain in the workforce, despite being able to afford to retire. The respondent referred to their situation as “*politically enforced slavery*”.

Funding

Some applicants indicated that insufficient funding is a disincentive to employ anyone with a disability who needs reasonable adjustment, as this may require additional expenditure. The applicant suggested separate funding should be allocated to Government Departments to encourage the employment of people with a disability who require reasonable adjustment.

Training

Lack of training provided in areas that require training to keep pace with change, particularly IT, was cited as a practice that discouraged or prevented older/disabled Australians participating in employment.

Ironically, and possibly worse, other respondents had the experience of being told they were “overqualified” or even “over experienced”, and others saw higher duties opportunities ‘dry up’ after undertaking degrees. Many respondents with these experiences inferred that supervisors or interviewers who did not hold tertiary qualifications themselves were intimidated by these credentials. Previous work experience also does not always assist. One respondent shared their experience of taking examples of projects they had worked on to a job interview, only to be told the sample projects were “too old” to suffice as sample of their work. This issue is problematic for anyone who takes time out of the paid workforce.

Incentives

Views on incentives to remain in the workforce (for older workers, workers with a disability and carers) identified by respondents appeared to be divided according to whether the respondent themselves was speaking of their own situation or about the situation of others. The differences were interesting.

Overall, “**money**” was the incentive most commonly noted.

Among respondents speaking on behalf of themselves, incentives noted were: “**secure employment; money; part time/flexible work/job sharing; superannuation (including insufficient superannuation to retire); keeping up with the cost of living; pension insufficient to live on and; training**”.

However, respondents speaking on behalf of the target groups, thought incentives to remain in the workforce were: “**mental stimulation; keeping up with the modern world; social contact; fulfilment; supportive workplace; self-esteem; financial independence; not wanting to be a drain on the public purse; contributing to society; remaining active**”.

Many respondents stated that there were no incentives to remain in the workforce.

Disincentives

Disincentives (for older workers, workers with a disability and carers) to remain in the workforce, as identified by respondents in the qualitative responses, can be broadly divided into three main areas: flexibility, workplace culture and physical/structural issues.

Job design and work flexibility

- rigid and inflexible hours

- difficulty in job redesign
- difficulty working from home
- difficulty booking medical appointments outside business hours
- difficulty juggling family responsibilities with full time hours
- not being able to transition to retirement through reduced hours
- lack of permanent part time positions available
- fatigue from full time hours and long commutes
- work hours appear to be getting less flexible

Workplace culture

- bullying
- stigmatised for utilising flexible work practices
- employer attitude (“patronising”, “condescending” and “lack of empathy”)
- “constant rejection”
- lack of knowledge among the people in the workplace of how they can interact appropriately – examples included speaking loudly to deaf people instead of looking straight at them, and pointing and gesturing when instructing a blind person
- emotional impact of discrimination
- lack of meaningful work
- workplace attitudes
- discrimination
- limited promotion prospects

Physical and structural barriers

- barriers around public transport make commuting difficult (lack of seats on trains and platforms, lack of facilities for people with a disability)
- lack of parking, toilets and ramps for people with a disability
- long commute times to work and
- transport costs

Other disincentives

- low pay
- no workers compensation insurance for older workers
- competitive job market
- lack of staff and time make it difficult to ‘buddy’ new employees

Women

64% of respondents thought that the experience of age or disability discrimination was different for women.

“Old men are seen as statesmen. Old women are seen as old hags”.

Caring work

Despite the fact that most women now work outside the home, women are still more likely to be carers not only of children, but also for aged relatives and relatives with a disability¹⁹.

When returning to the workforce full time, after time away for carer commitments, older female respondents indicated it was difficult to compete on account of their “thinner resumes”.

Some respondents related that qualifications may be seen as outdated when women return to the workforce after extended absences.

The issue of sick leave and carers leave appears to disproportionately impact women. Many respondents indicated concerns that sick leave, carers leave, ‘unscheduled absences’ and overall attendance records were factored into promotional decisions. With women bearing the brunt of carer responsibilities (as well as other domestic duties²⁰), they may be more likely to need leave, putting women at a disadvantage.

Many respondents lamented the lack of ability to work from home, despite advances in technology that enable remote working. Many indicated this would make juggling work and carer commitments easier.

Some respondents also pointed out that the timing of ‘career breaks’ from the paid labour force to meet carer commitments may occur at critical points which would normally be the ‘prime’ of a person’s career.

Career development programs and indirect discrimination

Some respondents were critical of ‘career development programs’.

Respondents stated that these are normally targeted, expressly or otherwise, at younger employees. The general sentiment was that unless you are on your way by your mid 30’s, there would be no more opportunities for career development. This is around the time many women would be returning from periods of maternity leave. If they have a child with a disability, more time may be required away from paid employment to undertake carer duties. Women are disproportionately impacted, as they are substantially more likely to be primary carers, not only of their own children, but of older relatives and other family members with a disability²¹. Part time employees or those on flexible working arrangements also report being ‘overlooked’ for career development opportunities.

Sexist attitudes

Some respondents indicated that the perception that women have a man to take care of them, and do not really need to work, persists.

Many respondents indicated that women are still judged by their “looks”, irrespective of qualifications and experience.

Discriminations erodes the physiological well-being of a woman quite harshly. Women are ...well aware of their...ability... To not have their skill levels recognised or valued in the workplace is

¹⁹ Women in NSW Report 2014. NSW Government. http://www.women.nsw.gov.au/publications/women_in_nsw_reports

²⁰ Ibid

²¹ Ibid

insulting. To be discriminated against because a younger model appears more appealing amplifies the insult and validates everything the media portrays about the stereotypical woman”.

“Older women...seem to become invisible”

The fact that women do not progress to the more highly paid positions in Departments at the same rate as men, was indicated to be a risk factor that made women *“more replaceable with younger staff”*.

It did not escape respondents attention that, while the under representation of (older) women on boards and in senior management is not new, this under representation persists despite many women now holding more academic qualifications than men.

While most respondents indicated that women suffered more harshly from age discrimination, some respondents felt that men’s experience of disability, particularly where this was the result of a workplace injury, was worse. While women focused on the difficulty juggling work and carer responsibilities, as well as coping with sexualised stereotypes around physical appearance, men seemed to focus on the loss of identity and social stigma they faced from not being able to be a breadwinner.

Some respondents also stated that, while it is still socially acceptable for women to be working part time or casual, this is still a taboo area for men.

One respondent noted that older women rarely feature in job advertisements.

One respondent stated that the statistics alone are sufficient to prove that women are still “second class citizens in the workplace”.

Examples of good practice and workplace policies in employing and retaining older Australians/Australians with a disability

Just over 20% of respondents were able to cite good examples of workplace policies and practices that assisted in employing and/or retaining employees who are older or have a disability.

While numerous respondents cited the policies of the NSW public service as examples of good policy, many respondents also indicated that, while the Public Service Commission had excellent policies, these did not appear to be broadly implemented in practice.

Several respondents did suggest the NSW public service was an equal opportunity employer, but examples of actual practices were scant, so it is not clear whether these respondents were referring to policy (as opposed to practice).

“In my experience government departments and agencies tend to lead the way in these areas, presumably setting a good example for private industry”.

“Aging Disability and Homecare (NSW), which is now being privatised, supports workers with a disability to maintain work, they make reasonable workplace adjustments, have flexible work hours and also equipment and access (ramps etc)”

Examples of Departments 'getting it right'

Within the NSW public sector **TAFE** was cited as a positive example. Regrettably, this may change if the NSW Governments 'Smart and Skilled' program leads to TAFE closures. The number of students with a disability enrolled in NSW TAFE colleges has already fallen by 11,500 compared to three years ago. This may be due to cuts to disability support services²².

Praise was given to **Legal Aid** for employing a sight impaired person and making provisions for his guide dog. Another respondent spoke highly of the DJAG (**Department of Attorney General and Justice**) Staff with Disabilities Network.

The Department of Planning and Environment was also mentioned as being "good at accommodating requests" (for reasonable adjustment).

The Department of Education was identified by one respondent as being willing to continue employing people as long as they could continue to do their job, an example was given of a 75 year old who continues to work there two days per week.

The University of Newcastle was noted as being "very proactive in this area".

Other comments where the Department was not named (some respondents indicated they did not wish to be identified) included an example of an amputee who stated that they were assisted to remain in the workplace, and a Department that had provided equipment to enable a deaf employee to do their work.

While it is outside the public sector, Bunnings was cited by many respondents as a positive example of harnessing the skills of older workers who may not be able to do heavy physical labour, but able to impart the knowledge gained over a lifetime to assist others. McDonalds was quoted as an example of an employer of people with a disability.

Comparison with other states

One respondent who had worked in both the Victorian and NSW public service stated that there seemed to be a disparity between the two, with managerial promotions in NSW based on technical ability, but the Victorian system having more emphasis on solving "people problems". Perhaps not surprisingly, Victoria was also said to be better at providing jobs for people with disabilities.

Mental health

Numerous responses indicated that adjustment on the basis of physical needs seemed to be easier to access than any adjustment due to mental health issues.

Progress – or lack thereof

Several respondents stated that in the past older workers and those with disabilities had been accommodated and treated compassionately, but that this was now changing for the worse.

Some respondents, again, did not think policy was thoroughly implemented.

"Can't think of any that are being practiced. The theory is there, the reality is not".

²² Cotsis, S, Jobs for People with a Disability Falling Under Baird, November 2015.

Outcomes members would like to see from the national inquiry

The outcomes respondents would like to see from the Inquiry can be broadly divided into several categories: recommendations for increased job flexibility and job security; campaigning, education and training; auditing; support; enforcement; a separate Inquiry into skilled migration and hidden unemployment as it impacts people with a disability, older Australians and carers and changes to the workers compensation system.

Recommendation for increased job flexibility and job security

- More flexible work
- Actual implementation of flexible work practices policies
- Establishment of hubs with 'hot desks' (to enable public servants to work remotely from government offices closer to their homes)
- More work from home (this would also assist to decrease traffic congestion and benefit the environment, as well as save on office space and utilities)
- More job share opportunities- where older workers share with younger workers and the older worker mentors the younger workers. In some instances this could be a reciprocal arrangement, with IT savvy young workers sharing their skill set with older workers, leading to both flexible work and an upskilling of both workers
- Mandatory 'transition to retirement policy' for all Government Departments.
- Job security for older workers

Campaigning, education and training

- More information (about rights) to be made available
- An awareness campaign to promote the skills of these people older workers, workers with a disability and carers.
- Unconscious bias training, including testing to show employers how they might be discriminating
- Better access to training

Recommendation for auditing and measurement

- Establishment of an independent review body for promotion and hiring (such as an independent external tribunal similar to the Government and Related Employees Appeals Tribunal, which no longer exists)
- Establishment of a body for auditing and monitoring
- The Workplace Gender Equality Agency (WGEA) has had some success in measuring, reporting and campaigning of gender equality. Many respondents called for a similar body to be established to audit and report on workplace discrimination more generally. This

should include audits of Government Departments (currently they are not required to report to WGEA).

- Respondents clearly indicated such an audit should be of practice in government Departments, as opposed to focusing on policy, and should include audits of recruitment and promotional decisions and documentation. There were general comments by respondents that employers can discriminate if they want to, and can hide this through lack of transparency and accountability in hiring and promotional practices. This is especially important where restructuring is occurring.
- Such a body should make statistical information available to the public, both on the workforce generally and individual employers.
- There were also calls for an audit of applications for flexible working agreements and reasonable adjustment, as well as the responses to these applications
- Such a body should also be given statutory *carte blanche* to “name and shame” organisations, including government Departments, where discrimination, is established.

Support

- More support in the workplace
- Assistance with job hunting for people with a disability extended to include proper professional assistance with applications, resumes and interview preparation (“***not the dodgy resumes done by employment agencies***”), as well as all other aspects of interview preparation including assistance with grooming and attire, to assist in putting them on an equal footing with other applicants.
- More carer’s leave. This could also be accommodated by allowing staff to use existing leave entitlements more flexibly. For example, the ability for everyone to take annual leave at half pay, and a certain amount of LWOP and more flexible use of purchased leave/more purchased leave (many of which would be close to cost neutral), as well as different forms of carers leave that recognise the realities of modern society, for instance some enterprise agreements allow for grand-parent leave. Many people, mostly women, also work and care for not only children, but also aged parents and in-laws.
- Increased number of identified positions for workers with a disability (especially in the public service)

Recommendation for enforcement

- A ‘spotlight’ on Government Departments who are making job share and flexible working arrangements difficult to access.
- Affirmative action recommendations
- Targeted positions to protect workers with disabilities in restructures.
- Greater protections generally
- Naming and shaming of discriminators

Recommendation for a separate inquiry into skilled migration and hidden unemployment

- An Inquiry into skilled migration to ascertain whether this is displacing Australian workers, including ascertaining whether their skills are genuinely in demand and whether an older Australian or an Australian with a disability (or any unemployed Australian) can be trained instead. This is particularly important with the offshoring of jobs and high unemployment.
- More accurate reporting of the real unemployment rates and hidden unemployment.

Unlike the measurements available for the youth unemployment rate, no statistics seem to be circulated about unemployment for people who are older, have a disability, or care for a person who is older or has a disability.

These groups may be a disproportionate number of the ‘hidden unemployed’ and not counted due to being in receipt of a benefit other than unemployment benefits.

Recommendation for changes to the workers compensation system

- Workers compensation for all workers until they retire
- Focus changed from the cost of workers compensation to how workplace injuries can be reduced in the first place.

It is important to note that some workers actually do not want to stay in the workplace. ***Some want to ‘retire with dignity’ at 65, not have their employment prospects ‘enhanced’.***

Recommendations/ Action that should be taken to address employment discrimination against older Australians and Australians with a disability and enhance workforce participation

The public service should lead the way and set an example for others to follow, not only by having exemplary policies, but in actual practice and measurable outcomes. The public sector should be a ‘model employer’, modelling ‘best practice’ in all aspects of the employment relationship including but not limited to workplace diversity, flexible work practices and providing reasonable adjustment. As an employer, governments at all levels have extensive resources and power that few private sector organisations have, including funding and specialist resources (legal, human resources expertise and industrial relations experts). While this is necessary for the efficient functioning of government, it also creates an intense power imbalance between the employer and an individual worker. This power should be accompanied by an obligation to act fairly and transparently.

1 The establishment of an ‘EEO certification board’ at the Commonwealth level, and the use of the term ‘EEO employer’ restricted for use by employers who meet benchmarks (measured by actual outcomes) and who are certified. All employers wishing to call themselves EEO employers should be required to

be 'certified' by this board, irrespective of whether they are private or government, at both state and Commonwealth level. A suggested mechanism could be similar to the establishment of the Workplace Gender Equality Agency through the Workplace Gender Equality Act. However, unlike this, the focus should be on established outcomes, not policy. Some positions on this board should be reserved for representatives from peak bodies representing target groups as well as employee (union) representatives.

2 The establishment of an independent external body at Commonwealth level to audit and report on workplace discrimination across state and Commonwealth agencies and other organisations.

3 Establishment/reestablishment of an independent external tribunal to hear NSW public sector employment and promotional appeals on the basis of merit (through the NSW Industrial Relations Commission).

4 Better access to flexible working arrangements and/or reasonable adjustment through more stringent requirements for employers to explain any refusal and the right of appeal to industrial tribunals (state and Commonwealth) as well as discrimination tribunals (see page 11).

5 Workers compensation coverage be extended to all employees, irrespective of age through amendments to existing legislation and the removal of any statutory exemptions preventing this.

6 Traineeships with government and non-government workplaces targeted at aged workers, carers and people with a disability, to allow them to move into new roles and develop new skills.

7 Separate and dedicated funding for employing people with a disability which is linked to clear employment targets for people with a disability.

8 An inquiry into skilled migration and whether this is necessary with such high unemployment, including whether funding of qualifications on the skills list, especially funding for 'fast tracked' qualifications for unemployed people, would be a preferable options for addressing skills shortages.

9 Increased funding at Commonwealth and State levels for legal advice and targeted support for employees wishing to report and prosecute discrimination.

As stated previously, it is impossible to overstate the degree of courage needed for an individual to report their boss or organisation for discrimination – particularly if they wish to remain employed.

Where the employer is a government department, they have resources at their disposal to defend such allegations, including entire legal branches, human resources experts, industrial relations experts and media units. Where external Counsel is engaged, this is also ultimately at the cost of the taxpayer.

With such resources available, there is also no excuse for ignorance.

Further, the funding of these resources is borne by the state (ie the tax payer). There is no assurance that an individual will have their costs funded by the state (though in some instances legal aid may be available or the applicant may benefit from a costs order). Penalties and damages awarded in discrimination matters are so low that these may not even cover the cost of running a matter and are not sufficient to act as an effective deterrent to Government Departments (or large corporations).

Respondents stated that “victims cannot afford to take matters” and that there needed to be “better funding for community legal centres to run prosecutions”.

Respondents also called for a reverse onus of proof in all discrimination matters (the onus being on employers to prove they did not discriminate at all stages of the matter), as the area is far too difficult to prosecute and the outcomes rarely make it worthwhile.

There were recommendations from respondents for “more teeth in the legislation”, “tougher fines and penalties, including (mandatory) dismissal of managers found to be discriminating...”. Many respondents felt anti-discrimination legislation was almost “unenforceable”.

11 Protection and incentives for ‘whistleblowers’

In some jurisdictions, notable the United States²³, whistleblowing is encouraged not only through legislative protections for whistle blowers, but through financial incentives for whistleblowers (ranging from 15-30 percent of the amount recovered). While the provisions in the US relate to revenue (tax) and banking, there is no logical reason why such laws could not be extended to encourage whistle blowing about discriminatory practices within organisations and government.

Ample protections are already in place to prevent the misuse of such provisions (if they were to be introduced into anti-discrimination legislation in Australia), both in legislation²⁴ as well as in employment contracts, employment law generally and organisation policy. In any case, the damages awarded in most discrimination matters are so small that it is unlikely the financial incentive would be large enough to encourage misuse of such a provision.

Employees who ‘blow the whistle’ on systemic discrimination should be protected and encouraged to come forward.

²³ Dodd-Frank Wall Street Reform and Consumer Protection Act 2010

²⁴ Defamation Act 2005 (NSW); Vexatious Proceedings Act 2008 (NSW)

12 A mechanism for anonymous reporting of discrimination

As stated in this submission, many respondents are too fearful of retribution to report discrimination they witness in the workplace. Some called for a mechanism to report discrimination anonymously to an independent external body with the power to investigate and prosecute (as per recommendation one).

13 Remote working hubs and an investigation into optimal investment by government Departments in emerging technology to facilitate work from home an co-located work options

Government Departments should be encouraged to establish 'remote working hubs' with 'hot desks' for employees who wish to work from a location closer to home within another government office. Shared government office blocks already exist in some rural towns. However, co-working spaces covering a variety of workers, not just public servants, might also assist people generally to work closer to home (for example 'fishburners').

14 Provisions in anti-discrimination legislation to give employees recourse to challenge forced relocations

Relocation of workplaces is especially problematic for employees, especially carers and people with disabilities, because this uproots them from existing support networks and services. The new location may not have comparable services available.

Efforts to challenge unjustified relocations of workplaces and employees on the basis of discrimination have proven ineffective.²⁵ Reforms to anti-discrimination legislation are needed to give workers some rights in this area.

This could include easier access to transfers within the public service.

Where challenged, the onus should be on the employer to demonstrate that the relocation is genuinely necessary or beneficial on public policy grounds.

15 Recruitment costs to be borne by individual business units

Government Departments are segmented for financial purposes, with each unit managing their own budget. While this is useful in many respects, it also creates false internal economies where the perpetrators of discrimination never bear the costs of that discrimination, including legal costs and recruitment costs where victims leave or are forced out of the workplace.

Where employees leave due to a lack of flexibility/reasonable adjustment or bullying, the cost of replacing them is not directly borne by the person directly or indirectly responsible for their departure (or failing to take steps to prevent their departure). These replacement costs are borne by separate areas such as recruitment, training and Human Resources. Where workers take discrimination matters to court, these matters are also dealt with by a separate legal area.

²⁵*Gardiner v New South Wales WorkCover Authority* [2003] NSWADT 184