

Volunteers, Age and Insurance

Investigation Report

Anti-Discrimination Commissioner
Tasmania

May 2013



ACKNOWLEDGEMENTS

The Anti-Discrimination Commissioner acknowledges, with thanks, all those who have contributed to this investigation through raising the issues, attending community forums, making submissions and reviewing drafts. Particular thanks to Volunteering Tasmania for raising the problem their members were having with obtaining volunteer insurance for older volunteers in 2010, to the Insurance Council of Australia and insurance industry participants for positively engaging with the investigation, to Jason Wright for his work on the initial stages of the investigation as Policy Officer at the Office of the Anti-Discrimination Commissioner, and to Leica Wagner for her extensive work on the investigation and report. Without these contributions this investigation would not have been possible.

© This publication is copyright. No part may be reproduced by any process without written permission from the Anti-Discrimination Commissioner, Tasmania

Publication: ISBN 978-0-646-90441-2

Office of the Anti-Discrimination Commissioner
Level 1, 54 Victoria Street
Hobart, Tasmania 7000

Phone: 03 6233 4841

(For full contact details, please refer to the inside back cover of this report.)

Volunteers, Age and Insurance

Investigation Report

Anti-Discrimination Commissioner
Tasmania

May 2013

Contents

Introduction.....	i
Summary of observations and recommendations	iii
Chapter 1: About this Report.....	1
Power to investigate	2
Interest in insurance coverage for volunteers	2
Objectives of this investigation	3
Methodology	3
Privacy issues	4
Structure of the Report	5
Chapter 2: Demographic and Social Context.....	6
Demographic change	6
Contribution of volunteers to our community	9
Volunteering in Tasmania	11
Changes in the nature of volunteer activity	12
Insurance as a barrier to work	13
Chapter 3: Legal context.....	15
Exceptions in relation to insurance services	15
Test of lawful discrimination	16
Actuarial, statistical or other data	17
Reliability of source	18
Other relevant information	19
Reasonableness	21
Chapter 4: Insurance	23
Structure of the insurance industry in Australia	23
Rate setting	24
Exclusions and endorsements	26
Insurance products available to community organisations	27
Volunteer personal injury insurance	28
Chapter 5: Summary of submissions	31
Different arrangements for younger volunteers	34
Different arrangements for older volunteers	35
Chapter 6: The view of community organisations.....	38
Availability, cost and coverage	38

Impact of lack of insurance coverage	39
Uncertainty regarding insurance coverage	40
Effect of lack of insurance coverage	41
Capacity of uninsured persons	41
Restrictions of benefits	42
Impact on community involvement	42
Nature of risk and managing it	44
Practice of insurers is relevant	45
Chapter 7: Insurance industry submissions.....	47
External factors impacting on volunteering levels	47
Availability of product	48
Underwriting guidelines and philosophy	49
Underwriting by exception	49
Product differentiation	51
Cross-subsidisation of risk	52
Loss of wages	52
Risk assessment and management	53
Chapter 8: Actuarial, statistical and other data	55
Actuarial data	56
Statistical Data	57
Disability	58
Injuries, falls and accidental death	62
Community injury	63
Children (0–14 years)	66
Younger people (15–24 years)	67
Older people	68
Workers' compensation	71
Age and capacity	72
Causes of death	73
Accidental death rates	75
Death rates	77
Chapter 9: Assessment and Observations	81
Actuarial, statistical and other data	83
Other relevant factors	85
Impact on public policy objectives	89
Summary of Observations:	90

Chapter 10: Future directions..... 92

Removal of age-based limitations 92

Increased transparency and enhanced reporting 94

Guidelines 96

Enhanced obligations on volunteer organisations 97

Simplified policy statements 100

List of Tables and Figures

Table 1:	Age Composition and Median Ages of the Population (at 30 June 2011)
Table 2:	Number of Tasmanians aged 65 years or older (2015–55)
Figure 1:	Voluntary work, by age
Table 3:	Activities, young people (2011)
Table 4:	Top 15 General Insurers
Table 5:	Summary of age and benefit limits
Figure 2:	Disability prevalence
Figure 3:	Summary of care arrangements
Table 6:	Community injuries
Table 7:	Case counts by age group for all major causes of community injury
Table 8:	Self-assessed health status of Australians aged 55 and over, 2004–05
Table 9:	Age-specific accidental death rates
Table 10:	Causes of death
Table 11:	Leading causes of deaths by age and sex, 2006

Introduction

The right to participate actively within our community is something that most take for granted.

Yet this is not a right we all equally have fulfilled.

For some, age alone may determine whether they take part in community activities, and not necessarily because their age affects their capacity to participate. This is the case for those volunteers who cannot access personal injury insurance to cover the risk associated with accidents or injuries arising from their work.

Many insurance companies adopt age limits for personal injury insurance for volunteers beyond which they are unwilling to provide insurance coverage. Where insurance coverage is available, policies often contain restrictions that prevent people in particular age groups from accessing the same benefits as others.

The difficulties in obtaining insurance coverage mean that some volunteers are contributing their time without insurance coverage, others are prevented from continuing to take part in volunteering activities altogether.

Anti-discrimination legislation in Tasmania and elsewhere represents an expression of the rights of people to participate in our community in a way that is fair and without discrimination. The *Anti-Discrimination Act 1998* (Tas) (the Tasmanian Act) is intended to send a clear signal that age discrimination is unacceptable and unlawful. With respect to the provision of insurance, discrimination on the basis of age is permitted if it is reasonable and based on actuarial, statistical or other data from a reliable source.

Insurance by its very nature is risk based. Insurance companies must make commercial decisions related to coverage and cost of policies based on the profile of risk as they understand it.

The question is, however, whether the way in which age is factored into the risk profile adopted by many in the insurance industry unfairly and unlawfully discriminates against some volunteers on the basis of age: whether it is reasonable in all the circumstances.

It is this question that forms the basis of my investigation into the data used by some insurance providers to justify age-based exclusions from insurance cover for volunteers.

Finding a balance between the interests of insurers, community organisations and volunteers has by no means been easy and I am grateful for the information that has been provided to me to assist in this investigation.

The conclusions I have reached are accompanied by some suggested ways to achieve positive progress on this important issue and I look forward to seeing this matter addressed and at a national level in more detail as that work proceeds.

Robin Banks

ANTI-DISCRIMINATION COMMISSIONER (TAS)

May 2013

Summary of observations and recommendations

Insurers use data relating to rates of accident, injury, hospitalisation and the likelihood of death within specified age brackets as the primary information on which risk judgments are based in the provision of insurance cover for volunteers.

It is argued that this data substantiates the view that there is a materially increased risk in providing personal accident insurance cover to both younger and older volunteers.

However, in my view the statistical data provided to me does not support the view that age alone is the only or best indicator of risk of accident, injury or other forms of ill-health that may result in a claim under volunteer insurance policies.

I am therefore of the view that the case has not been made for the application of the exception¹ found in section 34 of the *Anti-Discrimination Act 1998* (Tas) (the Tasmanian Act) and that insurers relying on the data provided to me as a basis for excluding volunteers from insurance coverage are potentially offering services, in the form of insurance, in breach of the Tasmanian Act. My reasons, in summary, are as follows:

1. The decision to exclude persons from volunteer personal accident and injury insurance coverage is made on the basis of age.
2. The practice of failing to make available insurance coverage to certain age brackets is a distinction or exclusion on the basis of age.
3. The effect of this distinction or exclusion is to nullify equality of opportunity for persons in those age brackets and to treat people of particular ages *less favourably*, on the basis of their age, than people in other age groups.
4. The legislative exception for age discrimination in respect of insurance services is available only if the decisions are based on actuarial, statistical or other data

¹ Exceptions in the *Anti-Discrimination Act 1998* (Tas) are effectively defences to an allegation of unlawful discrimination. These are legislatively different from exemptions under the Tasmanian Act, which are time-limit orders made by the Commissioner to provide temporary relief from particular obligations under the Act, as specified in the particular order. Care should be taken when considering this report in respect of other jurisdictions within Australia as anti-discrimination statutes in Australia are not consistent in the use of the terms 'exception' and 'exemption'.

The defences to age discrimination in insurance that are substantively similar to section 34 of the Tasmanian Act in federal, other state and territory legislation are: *Age Discrimination Act 2004* (Cth) s 37 (found in Part 4, Division 4 – General Exemptions); *Discrimination Act 1991* (ACT) s 28 (found in Part 4, Division 4.1 – General Exceptions); *Anti-Discrimination Act 1977* (NSW) s 49ZYT (found in Part 4G, Division 4 – Exceptions to Part 4G); *Anti-Discrimination Act 1992* (NT) s 49 – Exemptions, found in Part 4, Division 7); *Anti-Discrimination Act 1991* (Qld) s 74 (found in Chapter 2, Part 4, Subdivision 2 – Exemptions for discrimination in insurance area); *Equal Opportunity Act 1984* (SA) s 85R (found in Part 5A, Division 6 – General exemptions from Part 5A); *Equal Opportunity Act 2010* (Vic) s 47 – Exception – Insurance; *Equal Opportunity Act 1984* (WA) s 66ZR (found in Part IVB, Division 4 – Exceptions to Part IVB).

from a reliable source and are reasonable having regard to that data and other relevant factors.

5. The statistical and actuarial data provided to me does not support the decision to exclude individuals from volunteer personal accident and injury insurance coverage on the basis of age.
6. Other relevant factors presented to me provide insufficient support for the view that age is the only or an effective proxy for risk.

Accordingly, it is my view that exclusion from volunteer personal accident and injury insurance coverage is less favourable treatment on the basis of age, and as such discrimination as defined in the Tasmanian Act; that is not saved by the legislative exception and therefore meets the legal test of unlawful direct discrimination on the basis of age.

In accordance with these reasons, I make the following observations and recommendations:

Observation 1: With respect to insurers that do not have or have removed age limits from volunteer personal accident and injury insurance, I am of the view that there is no possible breach of the *Anti-Discrimination Act 1998* (Tas) in the form of age discrimination in the provision of insurance services.²

Observation 2: Insurers that have age-based limits on protection under volunteer insurance policies and have not provided evidence in the form of actuarial, statistical or other data on which those limits are based cannot claim that their conduct is protected by the exception found in section 34 of the *Anti-Discrimination Act 1998* (Tas) and, as such, are engaged in activity that meets the legal definition of unlawful discrimination on the basis of age in the provision of services.

Observation 3: With regard to insurers that have age-based limits in volunteer insurance policies and provided evidence to me of the actuarial, statistical or other data on which they base their policy offer, it is my view that the evidence does not support the claim that the exception found in section 34 of the *Anti-Discrimination Act 1998* (Tas) properly applies.

There are three primary grounds on which I have reached this conclusion:

1. The actuarial, statistical and other data provided to me as the basis for excluding volunteers from insurance cover or restricting that cover on the ground of age is not of sufficient detail or relevance to substantiate the argument that persons within particular age brackets represent an unacceptable risk.
2. Having considered the full range of material available to me I am not satisfied that other relevant factors raised by the insurance industry support the case for the application of the exemption.
3. The decision to exclude or limit cover available to persons within particular age brackets from volunteer insurance coverage represents a significant barrier to

² Age discrimination in the provision of insurance services would breach the Tasmanian Act on the basis it would fall within the prohibition against discrimination found in section 14 of the Act on the basis of the protected attribute of age, found in section 16(b) of the Act, in the provision of services, specified as relevant area of activity in section 22(1)(c) of the Act.

the achievement of broader public policy objectives, including the removal of age barriers to both paid and unpaid work and this is a consideration that is relevant to determining the application or otherwise of the exception.

In accordance with these Observations I make the following recommendations:

Recommendation 1: That those insurance providers that have age-based limits in volunteer insurance policies amend their policies to remove those limits unless and until they are able to produce evidence that demonstrates that such limits are justified by risk in accordance with the exception contained in section 34 of the *Anti-Discrimination Act 1998* (Tas).

Recommendation 2: That the Insurance Reform Advisory Group be requested to oversee the development of an Insurance Industry Anti-discrimination Compliance Code, containing both compliance and enforcement mechanisms aimed at providing clarification of the way in which insurance exceptions in anti-discrimination law are to apply, including in respect of volunteer insurance coverage.

Recommendation 3: That the Insurance Industry Anti-discrimination Compliance Code include binding timeframes for the removal of remaining unjustifiable age discrimination in the provision of accident and injury insurance for volunteers.

Recommendation 4: That the Insurance Industry Anti-discrimination Compliance Code be the subject of consultation with stakeholders representing the insurance industry; age and volunteering organisations; and with members of the Australian Council of Human Rights Agencies (ACHRA), being the Commonwealth, state and territory statutory anti-discrimination authorities.

Recommendation 5: That, subject to the passage of consolidated human rights and anti-discrimination law at the Commonwealth level and agreement by the members of ACHRA, the Australian Human Rights Commission be requested to certify the Insurance Industry Anti-discrimination Code for application across the insurance sector. In the absence of that consolidation, it is recommended that IRAG work with ACHRA to identify alternative mechanisms to implement the Insurance Industry Compliance Code.

Recommendation 6: That section 34(2) of the *Anti-Discrimination Act 1998* (Tas) be amended to provide that a condition of having protection from liability by reason of the exception include that insurers provide reasonable access to the data on which exception to the Act is sought if requested to do so by affected parties and/or the Anti-Discrimination Commissioner.

Recommendation 7: That insurers that are unwilling to provide coverage for volunteers in particular age groups, or that provide (or propose to provide) differential benefits on the basis of age or coverage at a different premium, be required as a matter of course to provide reasons and to refer those seeking insurance to another insurer able to provide coverage or to the Insurance Council of Australia or the National Insurance Brokers Association as provided for under Standard 2.1.5(b) of the General Insurance Code of Practice.

Recommendation 8: That insurers be required to submit for open publication, a list of products where age is a factor used to exclude coverage or determine premiums and benefits and the data on which these decisions rely.

Recommendations 9: Noting the work already done by the Australian Human Rights Commission on insurance guidelines in respect of disability, that the Australian Human Rights Commission develop national guidelines, in consultation with other members of ACHRA, on the way in which exceptions for insurance provision in anti-discrimination law more broadly are to operate. Such guidelines should include information on how any exception should apply, the nature of the actuarial, statistical or other data required to substantiate a claim for exception and examples of how insurers can meet the terms of the exception in the least discriminatory manner.

Recommendation 10: That the Australian Charities and Not-for-profits Commission implement strategies to increase awareness among charities and not-for-profit organisations about duties and obligations to volunteers, including legal liability for injury compensation in the event that insurance coverage for volunteers is not obtained or is restricted.

Recommendation 11: That options be explored at the State level by Volunteering Tasmania and other bodies working with organisations that use volunteers with support from the State Government to seek the provision of universal personal accident and injury coverage for all Tasmanian volunteers not covered under the Tasmanian Risk Management Fund, including volunteers in age brackets that are currently excluded from coverage, through a bulk purchase agreement brokered with the assistance of the Tasmanian State Government.

Recommendation 12: That peak bodies for organisations in Tasmania that use volunteers develop strategies to encourage member organisations to make available to all volunteers a statement of their rights, duties and obligations, including the terms of any insurance coverage.

Recommendation 13: That not-for-profit peak bodies work together to support the development of information resources for members about insurance products, the benefit of advocating to potential insurance providers and brokers about insurance cover required for volunteers, including the age of volunteers and the potential benefits of shopping around to ensure the cover needed is obtained.

Recommendation 14: That further work be done by key stakeholders nationally to encourage the simplification of insurance policy documents to provide a clearer explanation of the insurance coverage purchased by organisations.

I. BACKGROUND

Chapter 1: About this Report

The Tasmanian Anti-Discrimination Commissioner is an independent statutory officer with responsibility under the *Anti-Discrimination Act 1998* (Tas) (the Tasmanian Act) in respect of discrimination and related specified conduct.

The Commissioner has responsibility for the following functions:³

- a) to advise and make recommendations to the Minister on matters relating to discrimination and prohibited conduct;
- b) to promote the recognition and approval of acceptable attitudes, acts and practices related to discrimination and prohibited conduct;
- c) to consult and inquire into discrimination and prohibited conduct and the effects of discrimination and prohibited conduct;
- d) to disseminate information about discrimination and prohibited conduct and the effects of discrimination and prohibited conduct;

³ *Anti-Discrimination Act 1998* (Tas) s 6.

- e) to undertake research and educational programs to promote attitudes, acts and practices against discrimination and prohibited conduct;
- f) to prepare and publish guidelines for the avoidance of attitudes, acts and practices relating to discrimination and prohibited conduct;
- g) to examine any legislation and report to the Minister as to whether it is discriminatory or not;
- h) to investigate and seek to conciliate complaints;
- i) to collect and analyse data relating to complaints;
- j) any other prescribed functions.

In undertaking these functions, the Commissioner has the power to determine the procedures to be followed in any investigation or conciliation.⁴

Power to investigate

Under section 60(2) of the Tasmanian Act, the Commissioner is empowered to 'investigate any discrimination or prohibited conduct without the lodgement of a complaint if satisfied that there are reasonable grounds for doing so'.

As noted above, section 6 of the Tasmanian Act provides that the Commissioner has the following relevant functions:

- (a) to advise and make recommendations to the Minister on matters relating to discrimination and prohibited conduct;
- ...
- (c) to consult and inquire into discrimination and prohibited conduct and the effects of discrimination and prohibited conduct...

Interest in insurance coverage for volunteers

The Office of the Anti-Discrimination Commissioner was first approached in mid-2005 regarding a possible complaint of insurance providers discriminating on the basis of age. On that occasion, the issue related to conditions on coverage and payment, including exclusions and differences in benefits provided on the basis of age.

Subsequent approaches from several not-for-profit organisations in 2010 confirmed that some insurers continued to differentiate on the basis of age, either through age-based exclusions or by restricting the coverage and benefits made available to volunteers on the basis of age. Representations were made about the impact that this was having on the ability of community organisations to retain older volunteers.

This was confirmed by Volunteering Tasmania when it advised that it continued to be approached by organisations having difficulty securing insurance to equitably cover all volunteers.

⁴ *Anti-Discrimination Act 1998 (Tas)* s 7.

After having further discussions with industry representatives and community sector organisations in early 2011, I formed the view that the issue warranted further investigation.

At the same time, work undertaken at a policy level in Tasmania and elsewhere confirmed the level of concern regarding this matter within the community.

In these circumstances, I was satisfied that there were reasonable grounds to investigate the potential age discrimination in volunteer insurance provision.

Objectives of this investigation

Through the investigation, I sought to examine the practice of insurers using age as the basis for placing restrictions on volunteer insurance policies and whether the way in which exclusion from insurance coverage is applied is unlawful under the Tasmanian Act.

In particular, the investigation aimed to test whether or not the exception set out in section 34 of the Tasmanian Act properly applied to decisions to discriminate on the basis of age in the provision of volunteer insurance. In order to apply, the decisions must be based on actuarial, statistical and other data and is reasonable having regard to that data and other relevant factors.⁵

Methodology

I publicly announced my decision to investigate this matter in May 2011.

To assist in the investigation, I developed and provided an Issues Paper⁶ (the Issues Paper) to key stakeholders, including members of the insurance industry, inviting comments on the issues raised. Through the paper I sought feedback on how decisions are made in relation to insurance coverage and any impact this has on volunteers and volunteer organisations. I sought information in particular on:

- the extent to which insurance coverage for volunteers varied according to age;
- the effect of age discrimination in the provision of volunteer insurance cover;
- the extent to which the differential treatment depending on age is based on reliable data; and
- the reasonableness of the actions taken by insurers.

In June and July 2011, I conducted a series of community forums around Tasmania to seek views on the matters set out in the Issues Paper.

⁵ *Anti-Discrimination Act 1998 (Tas)* s 34.

⁶ Anti-Discrimination Commissioner, *Volunteers, Insurance and Age: Investigation Issues Paper* (2011).

After examination of submissions received in the first phase of the investigation and consideration of the matters raised in the community forums, I formed the view that the information supplied by insurers was not of sufficient detail or quality to meet the requirements of the Act.

As a consequence I decided to use the powers available to me under section 97 of the Tasmanian Act to seek further information relevant to the investigation. Requests were sent to relevant organisations in March 2012.

A total of 55 representations were received during the investigation, including 33 from community organisations and 13 from insurance sector organisations.

A total of 24 insurance policies or associated arrangements were examined, ranging from the insurance policies of small regional or local organisations, to policies covering large State-wide or national bodies.

Further details of the information I received through the investigation is set out in Chapter 5.

In reaching my conclusions, I examined a range of factors that impact on the matters under consideration. This includes the role of volunteering within our community and the implications of excluding volunteers from coverage on the basis of age; identifying the impact on voluntary organisations; and examining the issue in the light of other policy objectives such as those related to the promotion of positive ageing and the progressive dismantling of other age-related barriers to both paid and unpaid work.

Consistent with this approach, I considered whether the way in which the exception is currently applied is least restrictive given the circumstances, and considered options that may help to remove unnecessary limits on participation in voluntary work.

Finally, I have taken into account the arguments put to me by insurance industry participants for the continuation of the current practice.

Privacy issues

In some cases information has been provided to me on the basis that it is commercial-in-confidence or otherwise relates to a commercial relationship between parties. Some submissions made by members of the public were provided on a confidential basis.

I have provided assurances to all parties that information will be treated in the strictest of confidence and not be made publicly available.

As a consequence, the information contained within this report has been de-identified and high-level summaries provided without reference to the particulars of the insurance arrangements of specific companies or related parties. Information

received by contributors to this investigation has not been referenced unless it is otherwise publicly available.

Structure of the Report

Part 1 provides relevant background material, including information regarding the current demographic profile and how this is changing; the status of volunteering nationally and within Tasmania; and an overview of the legal context in which the investigation has been conducted.

Part 2 examines the information received through the investigation, including the views of members of the community, community sector organisations and insurance industry members.

Part 3 examines in detail the data provided to the investigation.

Part 4 contains a summary of the conclusions I have reached as a result of examining the information provided to me and suggests ways in which the issue may be further addressed.

Chapter 2: Demographic and Social Context

Age discrimination occurs when a person is treated less favourably than another person, or is denied the same opportunity as another person, or is disadvantaged by a practice, condition or requirement because of their age.

Age is a characteristic or attribute everyone has and all members of the community have the potential to be treated differently on the basis of their chronological age.

Age discrimination often arises because of stereotypes and assumptions made about a person on the basis of their age. These include assumptions about the person's ability, health, fitness, strength, financial stability, honesty, skill or capacity. For older people, this may mean that assumptions are made about physical decline or health status. For younger people, it may mean stereotypical assumptions about their capacity to assume responsibility or attitude to risk and its avoidance.

Relevant to this investigation, age is being used as a basis for determining the level of risk associated with insurance coverage for those who take part in voluntary activity within our community. This includes local charitable organisations, environmental groups, community assistance organisations and arts organisations.

Whilst much of the public discussion about this issue has been about the impact on older people, both older and younger people are being excluded from insurance coverage.

Demographic change

The size and composition of Australia's population is constantly changing as the interaction of birth rates, migration and life expectancy impact on the shape of our community and markedly accelerate the ageing of the Australian population.

The Australian Bureau of Statistics projects the size of Australia's population will increase to between 33 and 62 million by 2101.⁷ At the same time it is anticipated there will be a significant decrease in the proportion of the population who are under 15 years of age and a marked increase in the number of Australians over 65 years of age.

In 2007, people aged 65 years and over made up 13% of Australia's population. This will increase to between 23% and 25% in 2056 and to between 25% and 28% in 2101.

⁷ Australian Bureau of Statistics, *Population Projections, Australia 2006-2101* (Cat. No. 3222.0) released 4 September 2008.

Similarly, the number of people aged 85 years or over is likely to increase rapidly over the next 50 years, from 344,000 people in 2007 to between 1.7 million and 3.1 million people in 2056. By then, people aged 85 years or over will make up 5% to 7% of Australia's population, compared to only 1.6% in 2007.

Table 1: Age Composition and Median Ages of the Population (at 30 June)

	0-14 YEARS			15-64 YEARS			65 YEARS & OVER			85 YEARS & OVER			MEDIAN AGE		
	1991	2006	2011	1991	2006	2011	1991	2006	2011	1991	2006	2011	1991	2006	2011
	%	%	%	%	%	%	%	%	%	%	%	%	years	years	years
NSW	21.6	19.6	18.9	66.6	66.9	66.7	11.9	13.5	14.5	0.9	1.6	2.0	32.9	36.8	37.7
Vic.	21.3	19.0	18.2	67.2	67.6	67.8	11.5	13.4	14.0	1.0	1.6	1.9	32.5	36.7	37.3
Qld	22.7	20.4	19.8	66.5	67.5	67.2	10.8	12.1	12.9	0.8	1.4	1.6	31.8	36.0	36.6
SA	20.7	18.3	17.7	66.4	66.6	66.4	12.9	15.1	15.9	1.0	2.0	2.3	33.6	38.8	39.5
WA	23.2	19.9	19.2	67.1	68.3	68.7	9.7	11.8	12.1	0.8	1.3	1.5	31.5	36.2	36.3
Tas.	23.1	19.7	18.7	65.0	65.7	65.3	11.9	14.6	16.1	0.9	1.7	2.0	32.4	38.8	40.4
NT	27.8	24.5	22.6	69.5	70.9	71.8	2.6	4.6	5.5	0.1	0.3	0.3	26.9	30.9	31.4
ACT	23.5	18.8	18.1	70.3	71.7	71.4	6.2	9.5	10.5	0.4	1.0	1.3	29.5	34.4	34.5
Aust.(a)	21.9	19.6	18.9	66.8	67.4	67.3	11.3	13.0	13.8	0.9	1.6	1.8	32.4	36.6	37.3

(a) Includes Other Territories - see paragraph 2 of the Explanatory Notes.

Source: Australian Bureau of Statistics 3101.0 *Australian Demographic Statistics Dec 2011* (released 20 June 2012)

Population projections for Tasmania show an even more pronounced trend.

Tasmania's population is expected to be older and age more rapidly the Australian population as a whole over the coming decades.

Tasmania's Demographic Change Advisory Council estimates that over the next 20 years the proportion of Tasmanians under the age of 15 will decrease by approximately 14 per cent while under some scenarios the proportion of people aged 65 years and over could grow by almost 80 per cent.⁸

⁸ Demographic Change Advisory Council: *Demographic Change in Tasmania: Challenges and Opportunities* (Government of Tasmania, October 2007) xi.

Table 2: Number of Tasmanians aged 65 years or older (2015–55)

Year	65–84	85–100	total 65-100	Total projected population	65–100 as % of pop'n
2015	80,805.00	11,770.00	92,575.00	519,543.00	18%
2020	94,791.00	13,069.00	107,860.00	534,398.00	20%
2025	109,106.00	15,344.00	124,450.00	547,964.00	23%
2030	120,615.00	19,360.00	139,975.00	559,489.00	25%
2035	124,541.00	25,924.00	150,465.00	568,288.00	26%
2040	126,537.00	31,651.00	158,188.00	574,356.00	28%
2045	123,948.00	37,074.00	161,022.00	577,940.00	28%
2050	123,322.00	41,272.00	164,594.00	579,604.00	28%
2055	125,144.00	42,886.00	168,030.00	580,090.00	29%

Source: Demographic Change Advisory Council (medium series)

There will also be a marked increase in the number of Tasmanians over 85 years of age. From an estimated number of 8,600 people in Tasmania in 2006, the projected number of people over 85 years of age is expected to increase to around 32,800 by 2046.⁹

These changes will influence many factors in our community, from the way in which vital services are delivered to the likelihood of increased reliance on older volunteers to provide pivotal community supports.

We are also seeing greater diversity in the way in which we age. The concept of a single finite step from work to retirement is becoming increasingly blurred as we live longer and our capacity at different life stages changes.

It is no longer possible to speak of a linear progression through different life stages. Transition through various phases is becoming less clear-cut and the distinction between different categories of productive activity harder to define.

The assumptions often made about the capacity of individuals at different age or life stages are less relevant and accurate, making the use of age more problematic as a predictor of life events.

As a consequence, the use of age as a proxy for capacity or productivity is coming under closer scrutiny, particularly in relation to employment where there is an emerging understanding that basing decisions on age alone means that as a community we may be missing out on vital contributions from older people. Coupled with a desire to increase workforce participation, age distinctions in legislation are increasingly being questioned and in some cases removed.¹⁰

⁹ Ibid 3.

¹⁰ See, for example, Australian Human Rights Commission, *Working Past our 60s: reforming laws and policies for the older worker* (AHRC, 2012).

From 1 October 2011, for example, the Western Australian Government removed age restrictions in workers' compensation legislation, enabling all workers (regardless of age) to access compensation entitlements on the same terms.¹¹

At the same time age discrimination complaints are increasing, particularly as the perception grows that negative attitudes and stereotypes are being used to inform prejudicial decisions regarding employment, access to services and so on.

In 2010–11, the Office of the Anti-Discrimination Commissioner (Tasmania) received 20 complaints alleging age discrimination, amounting to around 13% of all complaints.

Contribution of volunteers to our community

Just as we are seeing changes in the demographic make-up of our population, we are also seeing changes in social interactions within communities, including some important changes in the way in which we engage in volunteer activity.

The work of volunteers benefits society in myriad ways. From the provision of essential emergency services to activities aimed at the protection of our environment, care of the elderly to arts and heritage programs, volunteers have become an important part of our service delivery framework.

Not-for-profit organisations rely to a significant extent on voluntary labour. The 58,779 non-profit organisations registered with the Australian Taxation Office at June 2007 collectively engaged some 4.6 million people in a voluntary capacity.¹² These volunteers provided 623 million hours of service, equating to 317,200 full-time equivalent positions and contributed almost \$15 billion dollars in economic value to the community.¹³

At the same time, volunteering is as a critical factor in enhancing social inclusion. People who volunteer are more likely to be involved in other aspects of community life and are also more likely to provide informal help to family members in other households, to friends, neighbours and others needing assistance.¹⁴

Tasmania's *Social Inclusion Strategy*, for example, acknowledges the importance of volunteering in promoting community connection and recommends an audit of legal, institutional and administrative barriers to volunteering.¹⁵

¹¹ See Workcover WA, *Workers Compensation and Injury Management Amendment Act 2011*: Frequently asked Questions, available at http://www.workcover.wa.gov.au/NR/rdonlyres/0F598448-FAB2-4C89-A714-270215D7705B/0/Info_Sheet_Amendment_Bill_2011_FAQs.pdf

¹² ABS, *Australian National Accounts: Non-profit institutions satellite account 2006-07*, cat. no. 5256.0, (2009).

¹³ Ibid.

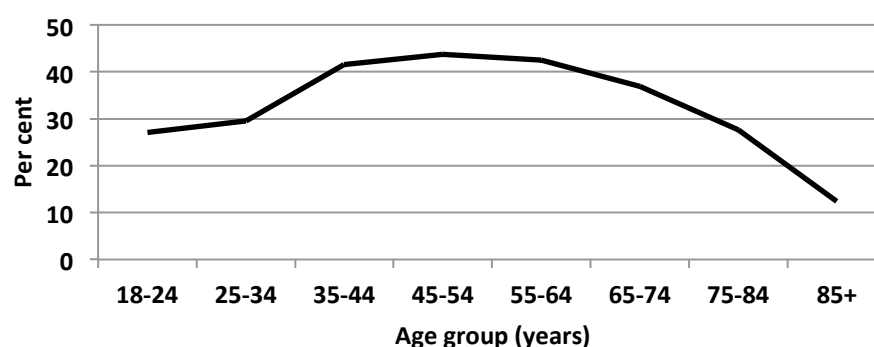
¹⁴ Ibid Table 9.

¹⁵ Professor David Adams, *A Social Inclusion Strategy for Tasmania*, (September 2009) 54–58.

Whilst the amount of time people are able to devote to voluntary activity has declined in recent years, volunteer rates in Australia remain among the highest in world.¹⁶

Over six million Australians aged 18 years and over engaged in some form of voluntary activity during 2009–10, representing approximately 36% of the adult population.¹⁷

Figure 1: Voluntary work, by age



Source: Australian Bureau of Statistics (ABS) 2011, General Social Survey, 2010.

Whilst people aged 45–54 years of age reported the highest rate of volunteering for any age groups, a significant proportion of older people are volunteers and older Australians contribute the highest number of volunteer hours of any age group.¹⁸

Over 27% of people aged 75–84 years participated in voluntary work in 2010. However, the proportion of those volunteering in later age brackets decreased significantly to 12.4% for those 85 years and older.¹⁹

A significant number of young Australians are also engaged in voluntary work. During 2011, 27.9% of young Australians aged between 11 and 24 years participated in volunteer work, slightly lower than those reporting involvement in volunteer work in 2010 (28.3%), but significantly higher than the rates reported in 2009 and 2008 (18.5% and 22.2% respectively).²⁰

¹⁶ Australian Bureau of Statistics, *Voluntary Work Australia 2010*, cat no. 4441.0, (2011).

¹⁷ Australian Bureau of Statistics, *General Social Survey 2010*, cat. no. 4159.0, 14.

¹⁸ Ibid Table 1.

¹⁹ Ibid.

²⁰ Mission Australia, *National Survey of Young Australians 2011: key and emerging issues* (2011).

Table 3: Activities, young people (2011)

	Tas 2011 %	National 2001 %	Tas 2010 %	Tas 2009 %	Tas 2008 %
Sports (as a participant)	66.3	70.7	74.6	74.0	69.9
Sports (as a spectator)	51.8	51.9	63.0	44.4	46.1
Youth groups and clubs	27.7	25.0	25.6	18.3	24.6
Arts/cultural activities	26.6	30.2	30.7	31.0	44.3
Volunteer work	25.7	27.9	25.0	21.9	20.0
Student leadership activities	22.5	24.4	26.1	9.2	10.6
Religious groups or activities	19.0	23.2	19.7	11.0	15.0
Environmental groups or activities	13.0	11.7	11.9	12.4	13.0
Political groups or organisations	4.3	4.7	5.2	n/a	n/a

Source: Mission Australia, *National Survey of Young Australians 2011: Tasmanian summary* (2011).

Sport and physical recreation organisations are those most commonly benefitting from voluntary involvement across all age ranges. However, people over 65 years of age are more likely to volunteer for welfare and community organisations.²¹ Older persons were also significantly represented as volunteers in religious and sport/recreational organisations.²²

Importantly, those volunteering today are more likely to have had parents who volunteered. Volunteering runs in families and older people volunteering provide an important role model for their younger family members. Evidence suggests that the younger a person is when they first engage in voluntary work the more likely they are to continue contributing to organisations in a voluntary capacity later in life.²³

Volunteering in Tasmania

Figures from the Australian Bureau of Statistics indicate that the proportion of Tasmanian adults engaged in voluntary work in Tasmania in 2010 was slightly higher than the national average at 41%.²⁴ This equates to 155,600 Tasmanians who volunteered in the 12-month period prior to the survey.

The ageing of the Tasmanian population will have a significant impact on the age profile of volunteers within this State with projections suggesting that the 65+ age group will increase considerably as a source of volunteers, making up to 29% of all Tasmania's volunteers in the next 20 years.²⁵

²¹ Ibid Table 14.

²² Ibid Table 14.

²³ Ibid Table 8.

²⁴ ABS, *Voluntary Work Australia 2010*, cat. no. 4441.0, (2011) Table 4.

²⁵ Natalie Jackson, *Volunteering Population Projections 2010-2032*, summary available at www.volunteeringtas.org.au/policy-and-research/sovr2012

At the same time the proportion of young Tasmanians engaged in voluntary activity is rising.²⁶

Of the 1,300 young Tasmanians surveyed by Mission Australia in 2011, around 26% indicated that they participated in volunteer work, an increase on previous reporting years (25% in 2010, 22% in 2009 and 20% in 2008).²⁷

Participation in volunteer work among young Tasmanians increased with age, with over 30% of 15–19 year olds likely to take part.²⁸

Changes in the nature of volunteer activity

The way in which volunteering activity is viewed has significantly shifted in recent decades.

Informal, community-based approaches to voluntary work are giving way in many instances to more structured forms of voluntary activity.

A significant proportion of the volunteer sector is engaged and resourced by government. This includes, for example, emergency services and environmental protection volunteering. At the same time many community service agencies now often utilise significant levels of voluntary labour in meeting formal service delivery obligations and there has been a significant increase in corporate volunteering.

Organisations engaging volunteers are exposed to more regulatory control and are becoming increasingly risk averse, with greater emphasis on ensuring that volunteers are well trained, appropriately managed and supported.

The national harmonisation of work health and safety laws, for example, means that all persons conducting a business or undertaking have responsibility to protect the health and safety of workers, whether paid or unpaid.²⁹ Whilst organisations that are made up entirely of volunteers and do not have any paid employees are not covered by relevant State legislation³⁰, organisations with a mix of paid and voluntary workers now clearly come within its scope and have the same obligations to provide a safe workplace for all workers—whether paid or unpaid—as all other businesses.

Such organisations are, for example, required to assess the nature of risks in the working environment, put in place strategies to eliminate or minimise those risks and discuss work, health and safety duties with all workers, including volunteers.

²⁶ Mission Australia, *National Survey of Young Australians 2011: Tasmanian summary* (2011) 96.

²⁷ Ibid 104.

²⁸ Ibid 105.

²⁹ See *Safe Work Australia Essential Guide to Work Health and Safety for Volunteers* (nd).

³⁰ *Work Health and Safety Act 2012* (Tas) s 5.

Insurance as a barrier to work

The issue of age discrimination in insurance coverage has been the subject of extensive policy discussion as the implications of age restrictions affect more people within our community.

Access to adequate and affordable insurance protection for all voluntary workers has been raised on a consistent basis by the not-for-profit sector as a barrier to attracting and retaining volunteers.

The *National Agenda on Volunteering*, developed as an outcome of the 2001 International Year of Volunteers, recognised the need to address issues around access to affordable and adequate volunteer and public liability insurance for organisations that involve volunteers.³¹ Whilst the focus of attention at the national level related to the implications of rising public liability insurance premiums, Volunteering Australia continued to emphasise the need for further examination of issues around access to volunteer personal accident insurance, including age-based restrictions and the level of benefits available to volunteers compared with those provided under workers' compensation legislation.³²

Various sector-based strategies have been pursued, including improved training in risk-management strategies and the development of new insurance products in conjunction with the insurance industry. This included, for example, Volunteering Australia and Aon insurance developing the 'Volunteers Vital Pack' as a means of accessing improved insurance coverage.

Whilst these efforts improved access to insurance coverage, Volunteering Australia and other peak organisations have continued to call for volunteers to be more comprehensively protected.³³

The Productivity Commission's 2010 research report into the contribution of the not-for-profit sector to the Australian community identified rising costs associated with recruiting, managing and training volunteers, including the costs of obtaining personal accident insurance coverage for volunteers as a key barriers to recruiting and retaining voluntary workers.³⁴

In 2011, the Advisory Panel on the Economic Potential of Senior Australians released a series of reports to identify issues, barriers and steps towards increasing the economic potential of senior Australians.³⁵ Among the Panel's recommendations was a request that:

³¹ Volunteering Australia, *A National Agenda on Volunteering: Beyond the International Year of Volunteers*, (Volunteering Australia, Sydney 2001).

³² Volunteering Australia, *Submission to the Ministerial Meeting on Public Liability Insurance*, 27 March 2002, available at <www.volunteeringaustralia.org.au>.

³³ Volunteering Australia, *Issues Related to Insurance Protection for Volunteers* (April 2010).

³⁴ Productivity Commission, *Contribution of the Not-for-Profit Sector* (Canberra, January 2010).

³⁵ Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians: turning grey into gold* (Commonwealth of Australia, 2011).

... the federal government convene a roundtable with the insurance industry, peak organisations and senior Australians to identify any gaps in the availability and affordability of insurance for senior Australians, including insurance for volunteers and travel insurance.³⁶

In response to this recommendation, the Federal Minister for Financial Services established the Insurance Reform Advisory Group (IRAG) to examine insurance issues with industry and stakeholders.

In addition, the (then) Federal Attorney-General, The Hon Nicola Roxon, asked the Australian Law Reform Commission (ALRC) to conduct an inquiry into legal barriers to mature age persons participating in the workforce. An issues paper, *Grey Areas: Age Barriers to Work in Commonwealth Laws* was released on 1 May 2012.³⁷

Among the matters examined by the ALRC are impediments to participation in the workforce arising from age restrictions on workers' compensation payments and insurance cover in the event of a workplace accident. Options canvassed by the ALRC include making volunteers eligible for workers' compensation coverage and/or greater regulation of the insurance industry to better address barriers to mature age participation in the workforce or other productive work.

It is against this background that I have undertaken this investigation.

³⁶ Ibid 6.

³⁷ Australian Law Reform Commission, *Grey Areas – Age Barriers to Work in Commonwealth Laws* (Issues Paper 41, April 2012).

Chapter 3: Legal context

Both direct and indirect discrimination on the basis of a number of prescribed attributes are unlawful under Tasmanian law.

Section 14(2) of the *Anti-Discrimination Act 1998* (Tas) provides that direct discrimination takes place if a person (including a corporation or organisation):

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

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

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

- (a) share, or are believed to share, a prescribed attribute; or
- (b) share, or are believed to share, any of the characteristics imputed to that attribute –

more than a person who is not a member of that group.

Section 16(b) identifies age as a prescribed attribute and therefore makes it a ground on which it is unlawful to directly or indirectly discriminate. Section 22(1) identifies the areas of activity to which the Act applies. This includes activities connected with, for example, employment; education and training; the provision of facilities, goods and services; accommodation; and the membership and activities of clubs.

Definitions in the Tasmanian Act specifically reference volunteering. 'Employment' is defined to include 'employment or occupation in any capacity, *with or without remuneration*' (*emphasis added*).³⁸ 'Services' under the Tasmanian Act expressly includes insurance services.³⁹

Exceptions in relation to insurance services

The prohibition of discrimination under Tasmanian law is subject to a number of exceptions.

Exceptions are defences whereby otherwise unlawful conduct is not unlawful if the respondent person or organisation can establish on the balance of probabilities that

³⁸ *Anti-Discrimination Act 1998* (Tas) s 3.

³⁹ *Anti-Discrimination Act 1998* (Tas) s 3.

the circumstances are such that the exception properly applies.⁴⁰ Exceptions do not automatically exclude entities, areas of activity or particular conduct from the reach of anti-discrimination law. For the exceptions stipulated under the Act to apply, the case for their application to the particular circumstances must be made and be capable of being objectively sustained.

Section 34 of the *Anti-Discrimination Act 1998* (Tas) provides the basis for an exception from age discrimination being unlawful in the provision of insurance services:

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

The effect of section 34 is not to exempt all insurance from coverage by the *Anti-Discrimination Act 1998*.

The exception only applies to decisions or restrictions that are 'reasonable' and that are based on actuarial, statistical or other data that comes from a reliable source.

The Tasmanian Act requires insurers to make the case that the exception properly applies. It does not apply automatically for the reasons outlined above.

At issue is the reliance on age as the basis for determining eligibility for insurance benefits and the 'reasonableness' of the actuarial, statistical and other data on which this distinction is based.

Test of lawful discrimination

The wording in section 34 of the Tasmanian Act establishes an objective test that an insurer must meet in order to lawfully discriminate against another person on the basis of age.⁴¹ The test has three elements:

⁴⁰ *Anti-Discrimination Act 1998* (Tas) s 101.

⁴¹ As set out in *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT23. In this case, the Anti-Discrimination Tribunal of Queensland was considered section 74 of the *Anti-Discrimination Act 1991* (Qld), which is similarly worded to section 34 of the Tasmanian Act.

1. the actuarial, statistical or other data must exist;
2. the source of the actuarial, statistical or other data must be reliable; and
3. the decision to discriminate must be reasonable having regard to the data and other relevant factors.

Actuarial, statistical or other data

For insurers to rely on the exception in section 34, they must base the decision to discriminate upon reasonable and reliable data. The use of the expression 'is based on' indicates that such data must exist and the insurer must use it in making its decision to discriminate.

The approach of the Federal Court in *QBE Travel Insurance v Bassanelli* [2004] FCA 396 provides guidance on how this requirement is to be interpreted.⁴²

In this case the Federal Court was considering section 46(1)(f) of the *Disability Discrimination Act 1992* (Cth) which is similarly worded to section 34 of the Tasmanian Act. Here the words 'based upon actuarial or statistical data' were interpreted to mean 'that the discriminator actually based its decision upon certain actuarial or statistical data'.⁴³

Judicial guidance as to what actuarial, statistical or other data can be used to justify discrimination in the provision of insurance services indicates that the data:

- must be contemporarily relevant;⁴⁴
- must state that the condition of the person seeking insurance is an unacceptable risk;⁴⁵
- should come from an Australian source or, if there is no Australian source for the data, the insurance provider should provide further materials as to the local relevance and applicability of data from overseas and an explanation as to why there is no Australian data upon which to rely;⁴⁶ and
- must be from a reliable source.⁴⁷

Actuarial, statistical or other data must be sufficiently detailed to substantiate the argument that discriminating against a particular age group is an unacceptable risk.

The Center for Economic Justice argues that insurers discriminate against consumers when they act solely on the basis of a broad characteristic or shared attribute such as age.⁴⁸ In these cases underwriting guidelines are used as the basis for excluding from coverage a class of people who share the same characteristic or attribute on the basis that the shared characteristic alone represents a certain risk profile.

⁴² *QBE Travel Insurance v Bassanelli* [2004] FCA 396 [30].

⁴³ Ibid.

⁴⁴ *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 [17].

⁴⁵ *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT 23 (24 November 1998).

⁴⁶ Ibid.

⁴⁷ *Anti-Discrimination Act 1998* (Tas) s 34(1)(b).

⁴⁸ The Center for Economic Justice, *A Consumer Advocate's Guide to Getting and Understanding Insurance Data* (1999).

A decision to discriminate based on a risk exhibited by a particular class of consumers may, however, be considered appropriate if the underwriting guideline genuinely identifies a characteristic of consumers in that group that is demonstrably and uniquely related to risk.⁴⁹

To assess whether a practice *unreasonably* discriminates against consumers who are excluded from policy coverage, it is necessary to determine whether the risk factors taken into account are demonstrably and uniquely related to the characteristic on which the discrimination is based.⁵⁰ The data must be sufficient to enable the analyst to identify the unique contribution of the underwriting guideline or risk factor in question. Identifying the unique contribution is necessary to ensure that the underwriting guideline is simply not correlated, ie, a surrogate, for another rating factor, including prohibited rating factors. Such an analysis enables the analyst to determine whether the practice unfairly discriminates against consumers who do not satisfy the rating guideline. The data will show whether the underwriting guideline properly identifies a group of consumers for whom costs of the transfer of risk are higher or lower.

In other words, to substantiate their claim, insurers are required to prove that there is a proper actuarial basis for the age-related exclusions contained in their insurance policies.

This should include the characteristics of the individual risks being priced; differing loss costs between classifications included in rating manuals; and exposure statistics.

Reliability of source

Not only must the actuarial, statistical or other data be sufficient and identify that the person seeking insurance protection is an unacceptable risk; it must come from a reliable source. That is, it must be of a certain quality that makes it reliable.

The Court in *QBE Travel Insurance v Bassanelli* held that determining a reliable source requires ‘... an objective judgment about the nature and quality of the actuarial or statistical data relied on’.⁵¹

In outlining his approach to this matter, Mansfield J detailed instances where data would not be considered reliable:

- where it is qualified;
- where it has been based on an insufficient sample;
- where it is not directly applicable to the particular decision;
- where the data is incomplete;
- where the data is out-of-date; and/or
- where the data has been discredited.⁵²

⁴⁹ Ibid 11.

⁵⁰ Ibid.

⁵¹ *QBE Travel Insurance v Bassanelli* [2004] FCA 396 [30]

Opinion re: Elizabeth Kors and AMP Society also held that a source would be unreliable where it was not an Australian source, unless further material can be provided to indicate the local relevance and applicability of the data, and an explanation as to why there is no Australian data upon which to rely.⁵³

Insurers should be prepared to explain the basis of decisions including the limitations of information reasonably available, and at the same time be able to demonstrate that new data is being taken into account on a regular basis.

Other relevant information

Section 34(1)(b) of the Tasmanian Act requires that 'any other relevant factors' are taken into account in examining the reasonableness of the decision to discriminate on the grounds of age.

What is relevant for the purposes of assessing whether an action is discriminatory will differ from case to case.

Whilst no specific guidance is provided under the Tasmanian Act regarding what constitutes 'other relevant matters' in this respect, guidance is available in case law and related statutes. Section 7B of the Commonwealth *Sex Discrimination Act 1984*, for example, makes reference to matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances.⁵⁴ This includes the following:

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice

Clearly, there are factors of this nature that are relevant in this matter.

The impact of the action on those who are excluded from insurance coverage is a relevant matter, as is the potential impact on broader public policy objectives, including on organisations relying on volunteers to achieve their objectives, on the service systems that are built on a mix of paid and voluntary workers, and on those benefitting from those systems. Another relevant factor is the extent to which the objectives of the decision could be achieved in a less discriminatory way.

As noted in *QBE Travel Insurance v Bassanelli*⁵⁵, knowledge of the circumstances of the person seeking insurance is relevant to whether a decision is reasonable:

⁵² Ibid

⁵³ *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT 23.

⁵⁴ *Sex Discrimination Act 1984* (Cth) s 7B.

⁵⁵ *QBE Travel Insurance v Bassanelli* [2004] FCA 396.

[The decision to discriminate] requires that the particular circumstances of an individual who is discriminated against be addressed, but not in a formulaic way. Even if the exemption pathway provided ... [by section 46(1)(f) of the *Disability Discrimination Act 1992* (Cth)] is utilised, the reference to 'any other relevant factors' confirms that legislative intention.⁵⁶

With respect to a broad class of people, such as an age-group, this includes an understanding of volunteering rates and the extent to which the activity has the capacity to impact on the ability of those who are excluded to participate in public life and their community.

An understanding of the impact of the decision on organisations that rely on volunteers to deliver services is also relevant. The extent to which volunteers contribute to achieving the objectives of community organisations, the extent to which those in relevant age-groups participate in volunteer activity without cover and the rate of injury or death arising in these circumstances are other relevant factors that may inform an understanding of the reasonableness of a decision.

Other factors that I consider are reasonable to take into account include the impacts of social exclusion and loss of ability to participate in broader community activities arising from the decision not to provide insurance cover for volunteers, and the impact on the viability of current service system models.

Information that indicates that some insurers do not have age exclusions or restrictions in insurance cover for volunteer workers is also relevant. As noted in *Bassanelli*:⁵⁷

The reasonableness of the discrimination is a matter to be judged having regard to any other relevant factors... [T]he fact that another reputable insurer with apparently the same or similar knowledge was prepared to issue a policy ... was a matter which the Magistrate was entitled to consider as relevant.

An assessment may also usefully take into account legal, practical and business considerations associated with the discrimination.

If an insurer can demonstrate that it was prevented by law from offering a policy on terms that did not discriminate on the basis of age, this would be a relevant consideration.⁵⁸ Similarly, it may be relevant that an insurer may only be able to offer an underwritten product on the terms prescribed by the underwriter or not at all. (It should be noted that such a situation may result in the underwriter having accessory liability for the resulting discrimination under section 21 of the Tasmanian Act and similar provision in other anti-discrimination statutes.) Further, matters of commercial judgement may be taken into account.

⁵⁶ *QBE Travel Insurance v Bassanelli* [2004] FCA 396 [85].

⁵⁷ *QBE Travel Insurance v Bassanelli* [2004] FCA 396 [43].

⁵⁸ Indeed, this would be the basis of application of a different exception in the *Anti-Discrimination Act 1998* (Tas), being the exception found section 24.

Section 34(2)(b) requires, however, that the relevant factors on which the discrimination is based are disclosed.

Reasonableness

Taking these factors into account, in order to properly consider whether or not the limits on the provision of insurance on the basis of age are protected by the exception, I needed to examine whether the actions of insurers are 'reasonable' in all of the circumstances.

Not all discrimination is unreasonable or improper, or for that matter unlawful. To determine whether an action is reasonable requires an objective judgment made in the context of knowledge about the nature of the discrimination and the impact it will have on those who are excluded.

As indicated by Federal Court decision in *QBE Travel Insurance v Bassanelli*, a decision will not always be 'reasonable' simply because it is based on actuarial or statistical data. The data itself must be able to withstand scrutiny and must clearly establish that age alone is the primary determinant of the distinction being made.

The data must be reasonable to rely on and the decision itself must be reasonable.

The concept of 'reasonableness' has been given consideration in a number of cases. In *Waters v Public Transport Corporation*, the majority of the High Court found that 'reasonableness' encompassed what was reasonable in 'all the circumstances of the case'. In setting out his view, Brennan J stated:⁵⁹

It is not possible to determine reasonableness in the abstract; it must be determined by reference to the activity or transaction in which the putative discriminator is engaged ... first, whether the imposition of the condition is appropriate and adapted to the performance of the activity or the completion of the transaction; second, whether the activity could have been performed or the transaction completed without imposing a requirement or condition that is discriminatory...⁶⁰

This approach is consistent with that adopted by the Federal Court in *Styles v Secretary, Department of Foreign Affairs and Trade*.⁶¹

In that case, Wilcox J held that it is necessary to consider the question of what constitutes 'reasonableness' in a 'practical and not merely theoretical way' to determine if 'under all the circumstances' the discriminatory practice was 'objectively justified'.⁶²

⁵⁹ *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 (3 December 1991) [16].

⁶⁰ *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 (3 December 1991) [15].

⁶¹ *Helen Styles v the Secretary of the Department of Foreign Affairs and Trade and Philip Arthur Harrison* [1988] FCA 364 (18 October 1988).

⁶² *Ibid* [74].

This view was adopted by Bowen, Pinkus and Gummow JJ:⁶³

The criterion is an objective one, which requires the Court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.

As outlined by the Australian Human Rights Commission, in its consideration of how the concept of 'reasonableness' applies in relation to the *Disability Discrimination Act 1992* (Cth), it is not reasonable to refuse to insure a person simply because of historical practice or to rely on inaccurate assumptions about the people it wishes to exclude.⁶⁴ However, it is appropriate to consider matters related to practical and business considerations; the nature of the risk being considered; and the extent to which the practice impacts on the overriding aims of anti-discrimination law.⁶⁵

Relevant to this is whether the approach adopted by insurers is the least restrictive approach available in the circumstances. That is, whether there are ways of taking account of risk for insurance purposes other than relying on a person's age.

⁶³ *Re Secretary, Department of Foreign Affairs and Trade v Styles and Philip Arthur Harrison* [1989] FCA 342; 88 ALR 621 23 FCR 251 (28 August 1989) [51].

⁶⁴ Australian Human Rights Commission, *Guidelines for Providers of Insurance and Superannuation* (revised 2005) available at http://www.hreoc.gov.au/disability_rights/standards/Insurance/insurance_adv.html#4 section 4.

⁶⁵ Australian Human Rights Commission, *Guidelines for Providers of Insurance and Superannuation* (revised 2005) available at http://www.hreoc.gov.au/disability_rights/standards/Insurance/insurance_adv.html#4.

Chapter 4: Insurance

The provision of insurance is a contractual relationship between a person or organisation and an insurance company, which involves the transfer of risk for a fee or premium.

Thousands of insurance policies are sold across Australia every day. Each policy involves an assessment of risk and the setting of premium charges based on the risk being priced.

This chapter provides background to the insurance industry in Australia and how the concept of risk is considered in the policies it sells. It also provides an overview of the nature of insurance available to organisations relying on volunteer labour and the nature of personal injury insurance in particular.

Structure of the insurance industry in Australia

The general insurance industry in Australia is regulated by the Australian Prudential Regulation Authority (APRA) under the *Insurance Act 1973* (Cth). APRA sets prudential standards and monitors the performance of general insurers.

As at 31 March 2012, APRA supervised a total of 124 licensed general insurers. This included 112 direct insurers and 12 reinsurers. Total industry assets were \$115.9 billion. Total liabilities were \$85.6 billion. Net assets for the industry were \$30.2 billion.⁶⁶

Around two thirds of business undertaken by the general insurance industry is from 'short tail' policies where cover is provided against short-term losses, for example, motor vehicle and home insurance. The remaining consists of 'long tail' policies where the risk is spread over longer timeframes, for example, professional indemnity and mortgage insurance.

The Australian general insurance industry is highly concentrated with the three institutions—QBE, Insurance Group Australia and Suncorp—accounting for a large proportion of industry assets.

The Insurance Council of Australia (ICA) represents the interests of the general insurance industry. The ICA oversees the implementation of the General Insurance

⁶⁶ Australian Prudential Regulation Authority, *Quarterly General Insurance Performance Statistics* (March 2012) available at <http://www.apra.gov.au/GI/Publications/Documents/GI%20Quarterly%20Performance%2020120331.pdf>.

Code of Practice. The Code sets out minimum service standards and complaint procedures.⁶⁷

The Code is binding on ICA member companies and complements legislative measures designed to regulate the general insurance industry.

Table 4 provides an overview of the top 15 general insurers currently operating in Australia.⁶⁸

Table 4: Top 15 General Insurers

Rank	Entity	Net earned premium \$m	Performance result after tax \$m	Net assets \$m	Total assets \$m
1	QBE Insurance Group	14,759	676	10,212	45,725
2	Insurance Group Australia	7,238	338	4,580	22,923
3	Suncorp	6,277	394	7,678	24,683
4	Allianz Australia	2,483	256	1,846	8,935
5	Westfarmers	1,120	14	1,366	4,325
6	Zurich Australian Insurance	856	0	601	4,440
7	Munich Reinsurance Company Australia	851	333	1,002	3,284
8	Westpac Insurance	377	87	677	1,419
9	Commonwealth Insurance	376	26	143	609
10	Genworth Financial Mortgage Insurance	368	250	1,989	3,626
11	Swiss Re	347	111	727	4,103
12	Chubb Insurance	316	47	462	1,461
13	RAC Insurance	260	16	250	507
14	Chartis	256	129	564	2,603
15	ACE Insurance	225	48	272	1,431
NR	Lloyd's	1,747	n/a	n/a	2,910

Source: Price Waterhouse Cooper *Insurance Facts and Figures 2012*

Rate setting

Insurance providers determine the terms and cost of policies based on an assessment of risk.

⁶⁷ Insurance Council of Australia, *General Insurance Code of Practice* (2012) available at <www.codeofpractice.com.au>.

⁶⁸ Price Waterhouse Cooper, *Insurance Facts and Figures 2012*, available at <<http://www.pwc.com.au/industry/insurance/assets/FactsFigures-May12.pdf>>.

Underwriting is the process by which an insurer determines whether it will issue a policy and at what cost, based on a future estimation of the likelihood and cost of an unwanted event.

The pricing of risk involves a number of complex factors including an assessment of the probability or frequency of a claim event occurring and the severity or size of the claim should it occur.

Rating factors are those specific elements or factors taken into account when determining the terms and costs of a policy. These are characteristics that may impact on the severity or frequency of claims. For example when considering the provision of automobile insurance, a company may take into account the driver's driving ability, the driver's age, prior accident and other motor vehicle claims, the type of vehicle, how the purchase of the vehicle was financed, where the vehicle is garaged, the replacement cost of the vehicle and repair and maintenance costs. These are factors the company considers impact on the risk of an accident, theft or other insurable event, with some factors having greater relevance to particular insurable events than others.

All classes of insurance have identifiable risk characteristics. In commercial fire insurance, for example, restaurants usually have a higher risk rating than clothing stores. Manufacturing workers generally have a higher risk of workplace injury than clerical workers and so on.

Insurers also take into account the risks inherent in different classes of insurance. Some risks may be high in frequency but low in severity, for example, motor vehicle accidents and medical events. Others may be less frequent but high in severity, for example, earthquakes, hail damage.

Underwriting guidelines range from very detailed and specific risk factors, such as driving experience, to those that are broader and more subjective, such as 'lifestyle' factors.

Age is often used by insurers as a risk factor in determining the price and conditions associated with insurance coverage as insurers are of the view that it makes the underwriting process reasonably simple and, therefore, helps lower premiums.⁶⁹

For some insurance products, such as motor vehicle insurance, a person's exact age may be used to assess the level of risk posed. In some cases this may be accompanied by the need for an individual medical assessment.

For other types of insurance, for example, travel insurance, people are grouped into age brackets or bands, and premiums or other conditions of insurance apply to everyone within those bands. This is the case with insurance for voluntary workers.

Insurance companies operating in Australia are regulated through the Australian Prudential Regulation Agency⁷⁰ and are highly sophisticated in their approach to

⁶⁹ Association of British Insurers, *Age and Insurance: Helping Older Customers Find the Cover they Need* (Feb 2009).

determining the precise premiums to be charged for providing a specific coverage to a specific risk for a specific period of time.

The precision with which these judgments are made reflects sophisticated classification and rating processes that are heavily reliant on access to past statistical indicators including claim statistics and loss estimates, together with the impact of various rating factors, including those factors that reflect differences in loss propensity (which depending on the type of insurance sought can include, for example, age, gender and marital status) and the risk characteristics (for example, the estimated frequency and severity of claims).

Whilst much of this data may be held in-house, there has been increased emphasis by APRA and other agencies on making rate setting more transparent. This includes legislated requirements to provide APRA with relevant claims and policy information on a regular basis.⁷¹

Data-mining techniques are increasingly used to predict levels of risk. Analysis of information about those seeking insurance coverage can provide information on different groups, which in turn enables predictive modelling of likely insurance outcomes, for example, those groups that have the highest number of claims or the highest average insurance payouts.

Nevertheless insurers are likely to have some difficulty in providing objective justification of their practices where they are not strictly evidence-based or where the available evidence is limited.

Exclusions and endorsements

The terms of coverage associated with an insurance policy is outlined in the product disclosure statement (PDS).

The PDS outlines the coverage, table of benefits, exclusions and conditions.

The PDS is accompanied by a certificate of insurance or service contract that identifies coverage amounts, deductibles, exclusions, endorsements, extensions or conditions attached to the policy.

Both documents need to be taken into account when seeking to understand the precise coverage of the insurance policy, including any age limitations.

The practice of issuing insurance policies that exclude various classes of risk from coverage is common. For example, policies often exclude the payment of claims where the use of alcohol or drugs is linked to the otherwise insurable event.

⁷⁰ For information on the role of APRA in prudential supervision of general insurers, see www.apra.gov.au.

⁷¹ APRA maintain several statistical databases related to the performance of general insurers including a national claims and policy database.

An exclusion clause is a part of the contract that operates to exclude, restrict or qualify the rights of the insured. Exclusion clauses are, for example, used to exclude some volunteers from coverage on the basis of age.

Operating in conjunction with exclusions are conditions attached to the policy. These are, in some cases, being used to stipulate age restrictions in some policies.

The schedule of benefits outlines the payments that will be made in the event of a claim. Again, schedules are used to specify differential benefit amounts or limits based on identified characteristics of those covered by the policy (including age).

An endorsement is a set of conditions outlined in the certificate of insurance that modifies the coverage of the policy. It may, for example, act to add coverage for acts or things that are not covered in the PDS. Relevant to this investigation, endorsements are, in some cases, being used to extend coverage to volunteers who would otherwise be excluded from the policy on the basis of age.

Insurance products available to community organisations

For community organisations involving volunteers, legal liability may arise in a number of situations, including:⁷²

- negligence arising from volunteering activities that cause damage to property or injury to another person;
- breaches of occupational health and safety requirements;
- injury to volunteers undertaking activity for an organisation (including travel to and from their volunteering destination);
- liability under equal opportunity and anti-discrimination law; or
- liability under the provisions of relevant privacy legislation.

There are a number of types of insurance available to community organisations.⁷³ These include:

- workers' compensation;
- motor vehicle insurance;
- public liability insurance;
- professional indemnity insurance;
- buildings and/or contents insurance;
- directors' and officers' liability insurance;
- personal accident insurance/volunteer insurance; and
- fraud insurance.

⁷² See Volunteering Australia, *Insurance and Risk Management for Corporate Volunteers* (2006) 6–7.

⁷³ PILCH Connect, *Guide: Insurance and Risk Management for Victorian Community Organisations* (2008) 14.

As employers, community organisations are legally obliged to have workers' compensation insurance cover for all employees.

Volunteers are not ordinarily covered by workers' compensation insurance because they are not deemed to be employees for the purposes of workers' compensation legislation. However, there may be specific circumstances where coverage under an organisation's workers' compensation insurance is available.

In Tasmania, for example, volunteers with the Tasmanian Fire Service are deemed under section 5 of the *Workers Rehabilitation and Compensation Act 1988* (Tas) to be workers for the purposes of that Act and are covered by the workers' compensation insurance held by the Tasmanian Fire Service.⁷⁴ Volunteers acting under the direction of State Government Agencies who are not entitled to coverage under workers' compensation legislation are covered for personal accident under the Tasmanian Government's self-insurance arrangements, the Tasmanian Risk Management Fund (TRMP). The TRMP also covers students involved in workplace-learning activities.

Every workplace utilising volunteers is different and the needs and coverage of those working with the organisation will differ. For example, corporate volunteers, such as employees of a company engaging in community work as part of a corporate social responsibility program of the company, may be covered for any personal injuries under their employer's workers' compensation policies. Alternatively, volunteers may be covered under self-insurance arrangements.

Organisations with volunteers not otherwise covered need to consider whether levels of cover are appropriate. Where the organisation perceives a gap and wishes to minimise its exposure to risk, seeking insurance coverage through a private broker is the usual strategy to protect individual volunteers.

Volunteer personal injury insurance

Whilst volunteers may be within the scope of other categories of privately arranged insurance (such as professional indemnity and/or directors' and officers' liability insurance), for the majority of volunteers to be insured against the impact of death or injury arising from the volunteering activity, they must be covered by specific personal injury liability insurance.

Volunteer personal injury insurance covers voluntary workers in the event of accidental death, disability or injury that occurs whilst engaged in voluntary work for an organisation.

Volunteer personal injury insurance typically covers the following:

⁷⁴ Department of Premier and Cabinet, *Tasmanian Government Submission to the Anti-Discrimination Commissioner's Investigation into Volunteers, Insurance and Age* (July 2011).

- medical costs not covered by Medicare;
- loss of income (for people who are employed and are unable to work due to their injury); and
- home or study help.

Insurance covering voluntary workers for accidental death, disability or injury also typically provides a lump-sum payment in the event of accidental death and assistance to cover funeral costs.

Whilst each policy differs in detail (payment levels, cover and so on), commonly the coverage is for events that occur while a person is undertaking work for the insured (including travel to and from the place at which they are volunteering) provided that the injury is not as result of pre-existing physical or congenital conditions (or as a result of a number of other events, including anything that is deliberately self-inflicted).

Payments are subject to a payment limit (known as a maximum benefit payable), the amount of which varies according to the level of coverage desired by the organisation.

Unlike some insurance products (such as third-party liability in motor insurance and workers' compensation insurance), volunteer personal injury insurance is not compulsory and there are no mandatory minimum levels of cover.

Organisations involving volunteers in their activities may choose not to insure any of their volunteers at all, relying totally on self-insurance or any personal insurance held by the volunteer.

Where no personal insurance coverage is held, the organisation may inform the volunteer of the fact that they do not hold personal injury coverage, although in some cases it is evident that the volunteer may not be made aware that there is no recourse to insurance in the event of accident or injury sustained in the course of their volunteer efforts and that the claim will need to be dealt with by the organisation.

Alternatively the organisation may decide to purchase a lower level of coverage for certain categories of volunteer. With respect to the current investigation, for example, the organisation may decide against coverage for certain age groups because of the cost associated with providing full coverage.

Regardless of the existence of personal injury insurance coverage for volunteers, the way remains open for a volunteer to sue the organisation with which they volunteer where there is an injury to them or their property that they believe arises because of negligence or failure to avoid a reasonably foreseeable risk.⁷⁵

In the next chapter, I examine the insurance policies provided to me as part of this investigation.

⁷⁵ See National Council of Social Services, *Insurance information sheet: Public liability and volunteers insurance*
 <<http://www.ncoss.org.au/projects/insurance/downloads/VolunteerPublicLiability.pdf>>.

II. SUBMISSIONS

Chapter 5: Summary of submissions

In May 2011, I invited community organisations, insurance companies and industry associations to provide information on the way in which age is taken into account in insurance policies covering volunteers.

To inform the investigation the Issues Paper was released in May 2011 and in June and July 2011 community forums were held around Tasmania.

During this phase of the investigation, I received information and advice on the insurance arrangements of 16 organisations that use volunteers ranging from small local or regional organisations to Tasmanian branches of national organisations.

A further 25 written submissions were received in response to the Issues Paper: five from insurance industry participants; three from government entities; five from individuals; and 12 from not-for-profit organisations.

After examination of these submissions, I formed the view that there was evidence of volunteer insurance coverage being restricted on the basis of age and the information supplied by insurers was not of sufficient detail or quality to satisfy the requirements of section 34 of the Act.

As a consequence, I used the power available to me under section 97 of the Tasmanian Act to require the provision of further information relevant to the investigation. This included a request to insurance organisations to provide the following information:

1. Copies of the actuarial, statistical and other data, if any, used to make the decision by your company to exclude volunteers from personal accident insurance coverage on the basis of age.
2. For those covered by policies, copies of the actuarial, statistical or other data, if any, used to vary benefits available to volunteers on the basis of age.
3. Information regarding when the data was compiled and how often it is updated.
4. Information regarding how the data was derived. What sample it was based on and what was the makeup of this sample.
5. Details of the risk analysis undertaken in relation to those volunteers excluded from the policy.
6. Details of the risk analysis undertaken in relation to those volunteers who are offered reduced benefits on the basis of age.
7. Details of the source of the data, including whether it was collected in Australia and/or its relevance to the local situation in Australia.
8. Details of the assessments undertaken of the particular circumstances of the organisation seeking coverage, including risk profile and any other information regarding the nature of the work undertaken by that organisation, and, in particular, volunteers in that organisation, on which your assessment was based.
9. Details regarding any optional coverage available to organisations that may have volunteers outside of specified age groups and the basis on which this offer is made available to organisations.
10. Copies of the actuarial, statistical or other data used to inform the offer and benefits available under optional extended coverage on the basis of age.
11. Details of any similar products available to those outside of the organisations seeking coverage, eg, personal injury insurance for students or senior.

At the same time I wrote to organisations that had signalled their interest in the investigation seeking the following:

1. A full copy of their current insurance policy as it relates to volunteers, including details regarding coverage, exclusions and/or alterations to benefits on the basis of age.

2. Information regarding any assessment undertaken to inform their insurer of work undertaken by volunteers in their organisation.
3. Information regarding the cost of coverage of volunteers, including whether optional coverage has been made available to the organisation to provide comprehensive coverage of all age groups.
4. Details of any requirements placed on the organisations and/or its volunteers to ensure that they are covered by the organisation's insurance policy.
5. Where the organisation's volunteer insurance does have age restrictions, details regarding whether this was a decision made by the organisation based on the age or other characteristics of volunteers in the organisation.
6. Information regarding what steps the organisation had taken, if any, to address the situation regarding volunteers who are not covered under the organisation's policy.
7. Details regarding whether the organisation has excluded volunteers on the basis of the lack of insurance coverage, or otherwise been required to restrict their involvement in the organisation.
8. Details of any accidents or other related events where the organisation was prevented from making a claim because of the age exclusions in the current policy.

A further 14 submissions were received in May 2012 (eight from insurance industry participants, one from a government entity, and five from not-for-profit organisations) in response to this request.

In all, I have considered information from the community forums and the 55 representations received:

- 33 from not-for-profit organisations;
- 13 from the insurance industry;
- 5 from individuals; and
- 4 from government entities (state and/or local).

Importantly, one industry submission received by me provided advice that the product offered by that company involved restrictions on the basis of age that the company considered were not based on actuarial, statistical or other data from a reliable source. As a consequence the company advised that it had made the decision to amend the wording of its policy and underwriting guidelines to ensure compliance with the Tasmanian Act.

However, a review of the product disclosure statement and insurance policy relating to volunteers personal accident insurance issued by this company in early 2013 indicated that age restrictions were still in place for those aged younger than 15 years and older than 75 years.

Whilst it does not appear that the company has changed its policy and it is unclear whether it intends to do so, the removal of all age-based distinctions would remove

the basis for a claim of age discrimination and eliminate the need to make a case for the exception provided under section 34 of the Tasmanian Act. For those insurers that do not include age distinctions within their policies, it is open for me to conclude that they are not acting unlawfully in respect of this matter.

Not all insurers provided information to me setting out the basis on which discrimination within their policies is justified. For these companies, it is not clear whether they are unable to provide the data and other relevant information on which their underwriting decisions are based, or are unwilling to do so. This is largely irrelevant. The Tasmanian Act makes clear that discrimination on the basis of age in the provision of insurance is only permissible if the discrimination is based on actuarial, statistical or other data from a reasonable source and that the data is disclosed to the Tribunal when required to do so.⁷⁶

With regard to insurance arrangements, information was made available about the insurance arrangements of 33 organisations. Three organisations advised that they were covered by the State Government's Tasmanian Risk Management Fund with no restrictions on age; two did not have age restrictions of any kind imposed by their insurer; two did not provide sufficient information to determine precise age limits associated with their coverage; and one organisation did not have any accident or injury coverage for its volunteers based on the advice of its insurer.

Table 5 summarises information regarding age limits applying to the insurance arrangements of the remaining organisations.

Different arrangements for younger volunteers

Of the 25 insurance arrangements examined, 11 excluded younger volunteers on the basis of age. One excluded volunteer coverage for all persons under 18 years of age; two excluded those under 16 years of age; six excluded those under 15 years of age; one excluded those under 10 years of age; and one excluded those under five. In these cases there is discrimination on the basis of age, which is only lawful if the elements in the exclusion are made out.

Under the remaining 14 arrangements, the organisations held insurance coverage with no lower age limit.

In eight of these cases there was also no differentiation in benefits available to lower age groups. For these eight arrangements there does not appear to be any discrimination on the basis of age in respect of younger volunteers.

For the remaining six, however, even though there was no lower age limit, access to full benefits were limited on the basis of age. The commencement age for full benefits was 18 (3 arrangements), 16 (1), 15 (1) and 5 years (1) respectively. In

⁷⁶ *Anti-Discrimination Act 1998 (Tas)* s 34(2). While this matter has not been dealt with by the Tribunal, as Commissioner I required disclosure under section 97. Insurance providers that have not made available this information may have failed to fulfil the requirements of section 97(1).

these cases, there is an arguable case of age discrimination based on the provision of differential benefits on the basis of age.

Different arrangements for older volunteers

All but three organisations reported having insurance arrangements that excluded insurance cover on the basis of age for older volunteers.

For the 22 organisations that had age-based exclusions in their volunteer insurance policies, one had insurance cover that cut out at 70 years, five cut out at 75 years; nine cut out at 80 years; three cut out at 85 years; and four cut out at 90 years.

Table 5: Summary of Age and benefit limits

Policy	No limits	No policy	No detail	Lower Age Limit	Age at which full benefits start	Upper Age Limit	Age at which full benefits cease
1				-	-	80	67
2				-	-	80	60
3				-	16	90	75
4				16	16	80	80
5				-	18	85	75
6				15	15	80	80
7				-	5	-	65
8				-	15	-	75
9				15	15	75	65
10				-	-	70	65
11				-	-	80	75
12				16	16	85	75
13				15	15	75	75
14				5	5	80	80
15				15	15	75	75
16				-	18	90	60
17				-	-	80	75
18				-	-	80	75
19				15	15	75	65
20				10	10	90	90
21				15	15	75	75
22				-	-	90	90
23				18	18	85	85
24				-	-	80	80
25				-	18	-	65

Importantly, however, all 25 organisations reported restrictions on the benefits available to older volunteers. In two cases, these restrictions came into effect for

volunteers as young as 60 years of age; five restricted benefits from age 65 years; one from 67 years; ten from age 75 years; four from age 80 years; one from age 85 years; and two from 90 years of age.

The following is an excerpt from one of the policies demonstrating the type of wording used to exclude certain age groups:

In addition to the 'General exclusions applicable to all sections of the policy'
... we will not pay for any claim directly or indirectly arising from or connected
with

1. Death or bodily injury sustained or suffered by a volunteer who has not attained the age of fifteen (15) years or who exceeds seventy five (75) years of age, unless otherwise agreed by us and shown in the certificate of insurance...

Based on the above example, unless otherwise noted in the policy, any volunteer under 15 years of age or over 75 years of age is not eligible for payment for any event that would ordinarily result in a claim by a voluntary worker who falls within the specified age limits.

Restricted benefit periods and reduced payments on the basis of age are also frequently used as an underwriting tool to restrict availability on the basis of age. In these cases, insurance companies are willing to provide coverage to persons beyond the age stipulated in their product policy on the basis that the coverage may involve either reduced benefits and/or exclusions (either for pre-existing conditions or specific events) and at an additional cost to the insured organisation.

Of the insurance policies examined as part of this investigation, seven included extensions to the insurance policy to enable cover for age ranges beyond that provided in the standard policy. In all but one case, the extension was provided on the basis of a reduced benefit dependent on age.

For example, a policy will include an endorsement along the following lines:

ENDORSEMENTS

Age limits

Under 18 years of age	Death and capital benefits reduced to
\$10,000	
18–75 years of age	Standard benefits to apply
75–80 years of age	Death and capital benefits reduced to
\$25,000	
80–85 years of age	No death and capital benefits.
	Funeral benefits to \$5,000

Typically, the restriction on benefits means that if a volunteer sustains any bodily injury directly as a result of the work that is being undertaken for the organisation they will receive a payment that is either a percentage of the full capital sum insured against the event or a payment that is capped at a lower rate.

Using the above endorsement as an example, the sum insured for death and capital benefits events is \$100,000 and for weekly injury benefits \$1,000 for 104 weeks. In the case of a volunteer aged between 18 and 75 years the lump-sum benefit available in the event of accidental death is 100% of the sum insured, that is, \$100,000. In the case of a volunteer aged under 18 years the accidental death benefit available is \$10,000; for a volunteer aged 75-80 years the maximum payable is \$25,000 and for a volunteer aged between 80 and 85 years no accidental death benefit is payable, although a funeral benefit of \$5,000 is payable.

For an injury such as the loss of sight or loss of the use of two limbs, a volunteer aged 18-75 years will receive a lump-sum benefit of \$100,000. However, a volunteer under the age of 18 years who incurs the same injury will receive \$10,000.

In addition, many policies provide no or restricted coverage for younger or older volunteers who are permanently and totally disabled as a result of an injury sustained by volunteering. This includes both lump-sum benefits and weekly injury or sickness benefits. So, for example, in one policy a person over 60 years of age is entitled to a maximum weekly benefit period of 52 weeks as opposed to 104 weeks (or 2 years) for those within eligible age brackets. However, in a number of other policies, no coverage is provided to older persons for total and permanent disablement.

Chapter 6: The view of community organisations

Community organisations argue that the inclusion of age restrictions in the provision of volunteer insurance negatively impacts on their ability to attract volunteers and has important consequences for both younger and older people.

The following summarises issues raised in this investigation about the impact limits on insurance policies have on both volunteers and the organisations that rely on their assistance. For consistency and reasons of confidentiality, information has been de-identified.

Availability, cost and coverage

As outlined in the previous chapter, the overwhelming majority of insurance policies examined contain age restrictions of one form or another, either in relation to the coverage provided or the scale of benefits available to claimants.

Of the submissions containing age restrictions, some did include endorsements to the standard policy resulting in additional age-related coverage. The willingness to consider providing an extension of the policy in individual cases is a welcome demonstration of the improved flexibility insurers have shown in recent years on this issue.

However, of the policies examined, in only one instance did the request for an extension result in the age limit being removed entirely, and in that instance restrictions on the benefits available to certain age groups remained.

In addition, many groups raised the issue of the cost of securing additional coverage as a barrier.

One organisation indicated that it had discussed removing the age limits in its existing policy, but was unable to secure coverage for older volunteers because of the cost associated with extending the age limits in the policy.

Although we have received a quote to extend the cover to the over 80 yr olds a decision has been made not to do that, mainly because of the premium cost and the small cover that would be gained anyway.

Excerpt of submission received from a small regional local government organisation

In other cases organisations requesting extended coverage were told that it was not possible to change the terms of the policy.

These responses suggest that, in addition to age-related cut-off points, discrimination may also be occurring in relation to premium increases in respect of and

differential limits on the benefits available to certain age groups where coverage is provided.

Impact of lack of insurance coverage

Community organisations unable to secure coverage for all volunteers have the option of continuing to engage the services of the volunteer without insurance coverage (either by undertaking to self-insure or by requiring the volunteer to be self-insured (if possible)) or reject the offer of assistance from the volunteer. Several organisations represented at the community forums indicated that they too had adopted this approach.

Submissions received indicate that both strategies are used by volunteer organisations. Two organisations advised that they had to reject the offer of assistance from volunteers or terminate their involvement in the organisation on the basis of age and their failure to secure insurance cover suitable to their needs.

Volunteers, on reaching an uninsurable age (previously 80, now 85) have, in the past, not continued to be employed as they could not be insured.

Excerpt of submission received from a State branch of a national health advocacy and preventative educational service

Three organisations advised in submissions that they continued to engage volunteers who were not covered by the organisations' insurance policy.

In most cases this is done with the consent of the volunteer, who would otherwise be unable to continue their involvement in the organisation.

... this issue has a direct impact on our longest serving foundation club member, who at 92 years of age attends activities every week but I know is not covered by the scope of [our organisation's] insurance simply because he is outside the age range. I have made sure that he is aware of this and he chooses to continue to participate. It does however concern me, and other club directors, that he is carrying a greater risk than others by continuing to volunteer.

Excerpt of submission from the President of a local branch of a national community club⁷⁷

The implications of continuing to involve volunteers outside stipulated age limits without insurance coverage risk are potentially significant and can have devastating consequences for the organisation and/or volunteers and their families, as outlined in one submission by the daughter of two volunteers of a national organisation providing in-home support to individuals.

⁷⁷ Consideration is given below to where liability may lie for injury compensation, etc, in the absence of insurance coverage.

... whilst doing this volunteer work [my mother and father] were involved in a horrific accident which left my Dad in a coma for 6 months before he finally passed away. The [organisation] involved said that he was not covered by their insurance because he was too old (he was just 75.6 years old). [The organisation] said that it was unfortunate. Therefore my Mum had to deal with the many issues and problems with a broken leg and arm on her own.

Excerpt of private submission

Another person outlined her situation as a volunteer in regional Tasmania.

I was a volunteer helping at the ... luncheon held by [a voluntary organisation in regional Tasmania]. During the clean-up at the end of the day, I was returning some glass dishes to the kitchen when I slipped on the wet kitchen floor breaking [bones]. The kitchen staff had washed the floor and left it quite wet. They had not put any warning notices up to tell people that the floor was wet.

When I contacted [the organisation] I was told their insurance said because of my age I was not covered and should not have been in the kitchen at all.

Excerpt of submission received from an person who had been a volunteer of a national organisation for 25 years

Uncertainty regarding insurance coverage

A consistent theme through many submissions is the lack of understanding about where people stand in relation to the insurance cover provided by the organisation in which they volunteer.

Often it is not until after an accident occurs that the organisation or volunteer is made aware of restrictions on cover under their policy.

One company offering insurance cover in Tasmania gave an assurance that it could insure retired volunteers, but later was unable to confirm this when pressed for documentation.

Much is made in the media of the value of Australia's volunteers. Indeed, the dedication of volunteers is responsible for the underpinning of many a service and organisation. We would ask how these dedicated people can be so neglected. How many volunteers around Australia are even aware of the situation?

Excerpt of submission received from a small volunteer-run tourist attraction

Lack of awareness on the part of community organisations about the nature and precise terms of their insurance coverage represents a significant problem,

particularly where the scope of and limits on the coverage are detailed in a range of different insurance policy documents.

Ensuring information is clear and accessible, particularly in relation to disclosures related to age limits and/or conditions of coverage based on age, is critical. Requiring insurance companies to clearly stipulate age limits in product disclosure statements as well as in policy summaries would greatly improve transparency and do much to correct negative perceptions of the insurance industry. Improved signposting and the obligation to refer consumers to companies that can meet their insurance needs may also serve to reduce confusion and facilitate access to those insurers able to meet the requirements of individual organisations. A clear listing of insurers that are willing to provide insurance covering all age ranges (including information on the conditions under which they will do so) could also be usefully developed for circulation to community organisations.

This is a view that has found some support within the insurance industry.

Surveys have shown many volunteer organisations find insurance complex and there is a widespread lack of awareness of the level of insurance cover held by the volunteer organisation.

*Excerpt of submission received
from a national insurance body*

Effect of lack of insurance coverage

While it appears from a number of the submissions that volunteers may be continuing to volunteer in organisations that do not have sufficient or appropriate insurance to cover those volunteers in the event of injury, what is less apparent is an understanding by the volunteers or the organisations of the liability for any injury arising from the volunteering activity.

Neither the act of informing a volunteer that there is only limited or no insurance cover to claim against in the event of injury, nor a volunteer consenting to volunteer once they are so informed is likely to impact on the potential liability of the organisation in the event of a compensable injury.

Capacity of uninsured persons

Many submissions raised the point that those who continue to volunteer past the stipulated age limit continue to be suited to the tasks asked of them and, apart from the lack of insurance coverage, there is no impediment to their continued involvement in the organisation.

A number of our volunteers are aged between 75 and 85 and are currently provided with restricted voluntary workers insurance cover. In addition a small number either are, or are about to, reach the age of 85 from which time

our insurer offers no cover. While we are increasingly recruiting younger volunteers a significant proportion of the existing volunteer workforce are older. Many of these volunteers are entirely capable of continuing to volunteer beyond the age of 75, and in some circumstances beyond 85. Regrettably under the current insurance circumstances the financial risks associated with continuing to offer opportunities for these older volunteers uninsured can, in many cases, preclude their ongoing employment.

*Excerpt of submission received from a State branch
of a national health advocacy and preventative educational service*

As I am energetic, very healthy, keenly community-minded (senior) person, this is a big part of my life, and I would hate to think my year of birth relegated me to the ranks of the superannuated!

*Excerpt of submission received
from a volunteer aged over 85 years*

Restrictions of benefits

Several organisations expressed concern about the differences in benefits available to those outside of stipulated aged brackets.

I have recently become aware that our insurance company offers extremely limited cover for our volunteers aged over 75 years. Between the ages of 75–85 years the cover is reduced to \$10,000 and nil weekly benefit, over the age of 85 years there is no insurance cover. I am very concerned that some of our volunteers are not aware of this so are not able to make an informed decision and may actually be unknowingly exposing themselves to risk.

*Excerpt of submission received
from a volunteer in a small regional op-shop*

Impact on community involvement

Organisations reliant on volunteers argue that exclusion on the basis of age has the potential to send the community the wrong message about the value of older volunteers and deters older Tasmanians from continuing their active involvement in the community.

Several volunteers in our shop fall into the over 75 years age group, if they have to leave their volunteer roles due to lack of full insurance cover, the effects not only on themselves but to their customers, our wider community and the viability of our shop are wide-ranging. I am also worried about the possible impact on our older volunteers' sense of self-worth if they can no longer serve in their roles.

Some of our volunteers have limited opportunities for social interaction in their personal lives and their weekly work in the shop forms the hub around which their life revolves. The friendships formed with fellow workers and customers are mutually fulfilling and rewarding.

Many community organisations struggle to attract enough volunteer workers and our shop is no different. It is difficult to cover our present staff if illness or holidays occur. The loss of some of our most reliable and experienced workers would have a huge impact, dramatically increasing the workload of the remaining staff.

*Excerpt of submission received
from a volunteer in a small regional op-shop*

We do believe that there may be instances in the future where such restrictions might limit our ability to offer someone a position on a volunteer basis, or may make their decision to volunteer with our service that more difficult. As we are so reliant on our volunteer service, we do not believe there should be a limitation on the benefits through insurance. Indeed we would prefer to see more people in the restricted age groups using their life experience and expertise by providing a volunteer services and having restrictions may be detrimental to this. We believe that this not only benefits our service and the community but also benefits the individual volunteer irrespective of age.

*Excerpt of submission from an organisation
providing a telephone advice service*

At the same time, the inability to involve younger workers risks diminishing the establishment of a volunteering 'ethic' at a young age.

From a community development perspective, involving people in volunteering at a young age is a key way of establishing a life-long habit of being a volunteer.

... There is a risk that younger and older willing volunteers may be refused volunteering opportunities on the basis of age, which may deter their involvement in volunteering altogether.

*Excerpt of submission received
from a peak organisation*

Many organisations felt that the restrictions on insurance coverage had the capacity to make it more difficult for organisations to attract scarce volunteers.

There is a clear need to engage more volunteers in order to enhance volunteerism in Tasmania and support the increased capacity of volunteer-involving organisations. The need to engage more volunteers is demonstrated by the finding that more than three quarters of volunteer-involving organisations require more volunteers in order to continue meeting operational requirements.

*Excerpt of submission received
from a peak organisation*

It also risks diminishing social capital and community involvement.

Although our customer demographic is socially and financially wide, many of our clients are young, unemployed and struggling with small children. Many do not have a supportive older person in their lives and appreciate a kind word or hint on handling a lively toddler from an experienced grandparent. I have lost count of the number of times customers have commented to me on the difference a smile and a caring word has made to a bad day.

This may not seem particularly important in the grand scheme of national affairs but I believe that supportive people build strong and resilient communities where the contributions of all ages are equally valuable.

*Excerpt of submission received
from a volunteer in a small regional op-shop*

Nature of risk and managing it

There was little evidence from the material provided in submissions, actual policy documents and through targeted questions that the nature of the risk is being actively assessed. The same range of limits and restrictions on cover were found across organisations irrespective of the nature of the activities in which their volunteers were engaged. The nature of the activity is a relevant factor in considering likely insurable risks and whether or not those risks can be managed effectively.

Insurance is not the only way in which organisations can deal with risk. Risk management is also a primary mechanism for minimising risk and preventing harm.

Risk assessment by individual organisations is the process by which an organisation identifies risks and establishes policies and strategies to reduce or eliminate that risk being actualised.

Appropriate risk-management strategies include the identification of procedures to avoid or minimise risk or harm through, for example, appropriate training or supervision.

Increased risk levels associated with age, if and where they exist, can be actively managed by an organisation to minimise adverse events. For example, individuals

can be restricted in the activities they perform to those they can perform safely, the physical workplace can be re-organised to eliminate hazards, and the nature of tasks redesigned to avoid injury.

In theory an organisation that actively manages risk should be more attractive to insurers. But this does not appear to be the case.

Organisations vary enormously: in size; in activities; in management; and in the tasks they ask volunteers to perform. A group involved in tree planting, for example, has an entirely different set of risks to those faced by a volunteer in a community-run opportunity shop or someone delivering meals to people who are frail aged in their home.

The presumption that all risks are the same could not be further from the truth. All organisations have slightly different risk profiles that should be considered when determining insurance offers.

Submissions received indicate that older persons are aware of possible risks and the need to minimise the potential for liability.

However, information available for some organisations suggests that the levels of risk management within organisations are rarely taken into account in determining insurance coverage.

Despite providing a detailed risk management plan (currently being upgraded by a professional and independent external risk assessment agency), the insurer has only agreed to increase the maximum age of our volunteers to 80 years for the conference and 75 years for our general activities with no increase to our premium. It is this exclusion that has generated adverse feedback from elderly volunteers who are otherwise active in their communities/branches.

*Excerpt of submission received
from an arts organisation*

All 'human rights' come with 'personal responsibilities'. It is essential as you age to 'pace' yourself and not to become a liability to the group or organisation you volunteer for – and always to keep within organisation and other restrictions.

*Excerpt of private submission received
from a volunteer of over 25 years of experience*

Practice of insurers is relevant

Not-for-profit organisations argue that there is a difference between targeting certain market segments and the decision to refuse access to certain age groups.

The fact that some companies provide insurance coverage for all age groups, presumably in a competitive manner, demonstrates that for some companies the risk associated with certain age groups is not perceived to be so extreme as to exclude coverage.

With regards to the reasonableness of the discrimination, [We] strongly assert that the fact that some insurance providers do not discriminate on the basis of age in the provision of volunteer insurance should be a factor that is relevant to the reasonableness of the decision to discriminate by those insurers that do.

*Excerpt of submission received
from peak organisation*

Chapter 7: Insurance industry submissions

A primary focus of this investigation was to consider whether the decisions made by insurers are (1) based on reliable actuarial, statistical or other data; and (2) reasonable having regard to that data and to any other relevant factors.

Several arguments have been advanced by insurance industry participants as a basis for excluding targeted age groups from insurance coverage. These relate to a broad range of matters, including judgments about the need for insurance at certain ages and factors preventing the industry offering policies outside of standard underwriting guidelines.

Thirteen submissions were received from insurance industry participants.

One company acknowledged that its volunteer policy was not based on actuarial, statistical or other data from a reliable source and as a consequence it decided to remove the age-related restrictions contained within the policy. However, as noted above, a subsequent examination of its public product disclosure statement and policy suggests that age limits remain in place.

Other submissions were less supportive of or open to the removal of age restrictions in volunteer insurance policies.

This chapter provides an overview of the general arguments presented by industry participants to support the ongoing retention of age limits in insurance policies covering volunteers.

The following chapter examines in more detail the actuarial, statistical and other data provided by some insurers to substantiate the claim for exception.

External factors impacting on volunteering levels

At a national level, the insurance industry argues that failure to obtain insurance coverage should not be considered the determining factor in reduced numbers of people volunteering.

The Insurance Council of Australia expressed the view that issues driving the level of volunteering in Tasmania and elsewhere is complex and insurance coverage (or lack thereof) should not be seen as the key or determining factor in the rate of volunteering.

Although Tasmania has experienced an increase in volunteer numbers, there has been a reported decline in the overall number of hours of volunteering and of volunteers aged 55–64 years. A range of factors including access to transport, fuel cost, changes to traditional volunteering roles, as well as

changes to the labour market have all been reported as factors impacting on the extent of volunteering in Tasmania.

Excerpt of submission of the Insurance Council of Australia

Availability of product

At the same time, a number of industry submissions expressed the view that while there remain some gaps in the age brackets covered by standard industry products, insurance has become more accessible and no longer represents a significant barrier to volunteering.

Underpinning this argument is the view that organisations are not getting the coverage they desire because they lack knowledge about what is available and have therefore not found the right product.

There are a variety of insurance products in the Australian market, available through insurers or brokers, to support volunteers across a range of ages. While insurance cover is available and ... not a significant barrier to volunteering, some organisations may nonetheless experience difficulty finding the right cover for their activities and volunteers of a certain age.

Excerpt of submission of the Insurance Council of Australia

In some cases, industry sector participants pointed to a lack of awareness among local insurance brokers about the flexibility within their policies and the capacity to extend coverage if requested. This in turn is reflected in low number of organisations that appear to go back to their insurance broker to attempt to negotiate universal coverage.

Major insurers rely on local brokers as intermediaries in arranging insurance coverage. The broker is expected to have a direct relationship with the organisation, negotiate terms of coverage, issue policy and handle claims. One company making a submission to this investigation argued that, in some cases, the parent insurer is not aware of whether there has been any request for age extensions that have been denied.⁷⁸ The general position was that the insurer is able to cover any age group if requested.

⁷⁸ Under section 104 of the Tasmanian Act, an organisation will be liable for contraventions of the Act committed by an officer, member, employee or agent if the organisation fails to comply with the obligations to 'take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct'. Reasonable actions are likely to include ensuring agents are aware of the flexibility available within policies.

Underwriting guidelines and philosophy

One insurer advised that its underwriting guidelines and philosophy are to only offer personal accident cover to people of working age. Thus it takes into account the average retirement age of the workforce as a factor in determining age limits on personal accident insurance.

Similarly, some insurers provided advice that they are constrained by the guidelines of their supporting syndicates, which vary depending on their appetite for the class of business seeking coverage and that there is little opportunity to vary these assumptions. As such, the insurer has to adhere to global underwriting policies, which means that it can't cover any risk it desires: it has to be within the group's risk appetite.

Some reinsurance arrangements contain age restrictions that, in turn, restrict the risks insurers can underwrite:

[Insurer] notes that it is part of a global insurance group and, as such, has to adhere to global underwriting policies, which means that it cannot simply write any risk it desires – it has to be within the Group's risk appetite. [Insurer] also has in place various reinsurance arrangements. There may be caps and other restrictions which also impact on the risk [insurer] can write. Some reinsurance arrangements contain age restrictions which means [insurer] cannot obtain reinsurance cover in certain circumstances and this restricts the risks it can underwrite.

*Excerpt of submission received
from an insurance provider*

Underwriting by exception

Insurance industry participants advised that one response to the diversity of risks presented by organisations is to underwrite by exception.

Essentially this involves using an age limit within the standard policy wording to ensure that such risks are more closely considered. This enables insurers to consider the provision of coverage to persons outside of the nominated age limits on a case-by-case basis, once the insurer is afforded an opportunity to consider individual circumstances such as current and past medical history, past loss experience and nature of the work performed.

One approach that we adopt as part of our underwriting by exception is the use of an age limit within our policy wording, to ensure such risks are more closely considered ... whilst there are instances where coverage has been declined to voluntary workers who are above [the standard ages contained within the policy], this is not an approach that is adopted in all instances. [Insurer] will consider the provision of coverage to persons in excess of 75 years of age, once we are afforded the opportunity to consider their

individual circumstances, as required. The individual circumstances considered are all in areas such as current and past medical history, past loss experience and nature of work performed. [The insurer's] approach is to continue to look to underwrite such exposures on an individual case by case basis accordingly volunteers who are greater than 75 years of age will continue to be considered, provided they meet our acceptance criteria.

*Excerpt of submission received
from an insurance provider*

At the same time some insurers argue that it is difficult to accurately understand the individual profile of each insured volunteer, particularly where their contribution may be on a one-off basis or episodic.

In this circumstance, the company looks at other means in an effort to underwrite the risk, including the use of age limits:

The ability to accurately understand the individual profile of each insured volunteer is difficult, due to the fact that these volunteers perform this work on a one-off basis, or continual basis. As the insured person(s) will in many cases continually vary, it would create an onerous task for an insured entity to individually list and name such volunteers that perform voluntary work, for the benefit of the insurer. Therefore [insurers] look to use other means in an effort to underwrite the risk by exception and consequently the use of criteria other than the individual underwriting of each insure volunteer.

*Excerpt of submission received
from an insurance provider*

It is argued that the use of age to determine the level of risk posed keeps the cost of the insurance underwriting process low and makes the purchasing process less intrusive as it does not require individual medical assessments, which would drive the cost of insurance coverage higher.

In providing cover to voluntary organisations [the insurer] can provide cover for any age group. Whilst [the insurer] is not usually asked to provide coverage for over 85s, [the insurer] can provide such cover if requested. In determining whether to restrict cover, [the insurer] would consider data including statistical data from the Australian Bureau of Statistics and the Australian Institute of Health and Welfare. Both organisations provide data relevant to accident, injury, hospitalisation and the likelihood of death of the population by age category, which [the insurer] utilises in underwriting risk relevant to the provision of personal accident cover. [The insurer] would also look at its own portfolio, reviewing claims and underwriting experience.

*Excerpt of submission received
from an insurance provider*

Product differentiation

Risk factors are not the only basis for determining exclusions and restrictions in policies across the industry. Competitiveness among insurance companies, including decisions related to segments of the market to target, drive differentiation in the policies on offer. The insurance industry argues that product differentiation is an inherent characteristic of the free market and requiring uniform policy offerings to volunteer groups would distort this competition.

The Insurance Council of Australia submits that competitiveness among insurance companies, including on the basis of making decisions about which market segments to target, are inherent characteristics of a free market economy and that requiring uniform policy offerings to volunteer groups would distort competition.

Loss of the capacity to differentiate products on the basis of age would mean that insurers would be required to offer policies regardless of age. Insurers would have to redesign many products and adjust policy prices accordingly. In effect this could mean that insurance cover for volunteer workers could become more expensive and potentially offer lower benefits

Exclusions and restrictions are made on a commercial basis and enable insurers to target parts of a market, to differentiate their policies and offer a specialist product based on their own experiences, and at a price appropriate to the risk assessed.

Excerpt of submission of the Insurance Council of Australia

Further, it is argued that to require a standardised approach would be at odds with the prudential regime established by the APRA, which restricts their ability to entertain coverage beyond certain risk parameters.

Even with the best policy goals in mind, requiring uniform policy offerings to volunteer groups would distort competition. Given that the financial health of the general insurance industry is grounded in such risk management, restricting the ability of an insurer to determine the risk they take on may impact on their willingness to offer that insurance or, if offered, lead to serious consequences for their obligations under the prudential regime supervised by APRA.

Excerpt of submission of the Insurance Council of Australia

For this reason, it is argued that it is not possible to base an assessment of the practices of insurers that do restrict insurance coverage on the basis of age with those that offer policies without age restrictions.

An argument has been made that if one insurer offers insurance to a particular age range, it raises questions as to the decision-making practices of insurers who do not provide this cover. The Insurance Council submits the willingness of some insurers to offer a certain product to a specific market

cannot be used to draw conclusions as to the basis of other insurers' commercial arrangements, which are determined in light of their own claim book, underwriting decision-making processes and risk management strategies.

Excerpt of submission of the Insurance Council of Australia

Cross-subsidisation of risk

Some insurers argue that a mandatory requirement to extend coverage to all age ranges would increase premiums to such an extent that it would mean increased costs for all those covered by the policy, in effect meaning that those outside of presently excluded age brackets would be subsidising the costs of including them.

As outlined in the previous chapter, some organisations employing volunteers have confirmed that they have been unable to purchase additional insurance to cover volunteers of all ages because of the costs associated with doing so.

It should be noted that anti-discrimination law does not mandatorily require the extension of cover irrespective of risk. Rather, it requires the insurer to justify any age-based restriction consistent with the exception found in section 34 and similar provisions in other anti-discrimination statutes.

At the same time, industry participants argue that the cost of covering all age-bracket risks has the potential to drive individual companies out of the market altogether.

Loss of wages

Two submissions made by insurance industry participants argued that the decision to impose an age limit on volunteer insurance policies arises principally because there is no need to cover loss of income for those in older or younger age brackets.

Generally speaking, the main covers sought under volunteers cover are loss of wages due to injury, and accidental death. In respect of lost wages, the main issue, in our view, for restricting cover beyond certain age limits is to do with the financial need for cover. Retired persons, generally, do not need to protect their income since it will, typically, continue as is – via a pension or superannuation scheme – irrespective of their state of health. Similarly, a minor, if temporarily incapacitated, will not be financially any worse off because they will not have been earning a wage in any event.

Excerpt of submission received from an insurance provider

Risk assessment and management

A significant issue for insurers is the attention organisations pay to risk-management practices and whether volunteers are trained in risk-management techniques.

One insurer identified in its submission the attention paid to working with the organisation they cover to minimise risk. As noted in an earlier section of this report, however, some community organisations have advised that efforts to demonstrate sound risk-management practices have not always resulted in age limits being removed from volunteer insurance policies.

[The insurer and insured organisation] have over the decades been cognisant of the need for risk management and have encouraged the appointment of safety officers to mitigate potential risk.

Excerpt of submission received from an insurance provider

It is relevant to observe that, to the extent that any particular insurance provider seeks to rely on an argument that while it doesn't offer unrestricted cover others do and, as a result, there is a relevant product available for purchase, it is the legal obligation of each and every insurance provider to ensure that its actions and decision are compliant with anti-discrimination legislation. If an insurer seeks to exclude or restrict cover on the basis of age, it must be able to bring its conduct within the scope of the exception in order to avoid unlawful discrimination. By way of analogy, a restaurant that is inaccessible or that excludes people of a particular racial background cannot avoid liability under anti-discrimination law by telling a person with disability or a person of that particular racial background that there is another restaurant that is accessible or doesn't exclude people on the basis of race.

III. DATA

Chapter 8: Actuarial, statistical and other data

For the purposes of analysing the practice of using age as an underwriting guideline in the establishment of restrictions on volunteer insurance, it is important to consider whether age as a rating factor identifies a characteristic of volunteers in excluded age brackets that is demonstrably and causally linked to the likelihood of making claims in excess of the risk tolerance accepted by insurers.

The essential argument made by insurers is discrimination on the basis of age is justified because age is an indicator of risk.

This chapter examines the actuarial, statistical and other data provided by insurers in support of this argument.

Actuarial data

A number of industry submissions advised that the cover they provide is determined by the professional experience of the insurance body. Principally this relates to information arising from its own portfolio, its understanding of the history of claims and underwriting experience.

Actuarial data includes demographic, financial, economic and other data, including data from a company's own claims history, which is relevant to determining the risk factors to be taken into account in making a decision about the terms and price of a particular insurance product. The insurance industry utilises this data to make decisions in relation to the coverage offered to volunteers.

... members utilise actuarial data comprised within their own claims book, made up of their relevant claims and underwriting experience to determine risk factors relevant to a commercial decision to offer a product to a particular market. Such actuarial data is dynamic in nature, modelled on contemporaneous information and frequently reviewed.

Excerpt of submission of the Insurance Council of Australia

To rely on the exception provided in section 34 of the Tasmanian Act, insurance providers are required to prove that there is a proper actuarial basis for any age-related exclusion contained in their insurance policies. This should include the characteristics of the individual risks being priced; differing loss costs between classifications included in rating manuals; and exposure statistics.

Whilst a number of insurers advise that they would look at their own portfolio, reviewing claims and underwriting experience prior to determining the cover offered by their policy, no actuarial data was provided by insurance industry participants for the specific age ranges that are the focus of this investigation.

One insurer provided information from within its own claims book on gross written premium (GWP) and gross loss ratios (GLR) for people aged 16-65 years showing a higher gross loss ratio for both younger (16–25 years) and older (56–65 years) age groups. The same company provided information about claim frequency for personal accident claims for those in the 16–65 year age bracket showing a higher claim frequency for insured persons less than 26 years of age and insured persons aged 56 years and over. It is argued that a similar relationship is found across all business insurance products and that the figures demonstrate that insurance claims tend to be higher in younger and older age brackets. By extension, the insurer was of the view that insurance claims by those outside of these age brackets would be considerably higher.

As I have outlined in previous sections, the Tasmanian Act does not make provision for the exception to apply where no actuarial, statistical or other data is available. Legally, for the exception to apply the alleged discriminator must base its decision upon actuarial, statistical or other data⁷⁹, and that decision must be 'reasonable

⁷⁹ *Anti-Discrimination Act 1998 (Tas)* s 34(1)(b).

having regard to the data and other relevant factors'.⁸⁰ Without this information it is not possible to know if those who have been excluded meet the risk criteria set by the company.

Statistical Data

Some companies advised that actuarial data is limited, particularly for insurers that rarely (if ever) accept the risks of covering volunteers in specified age ranges and have little experience with these age cohorts.

Other insurers advised that they are unaware of any actuarial studies relevant to the specific subject of the investigation or did not have in their possession these documents.

These insurers indicated that they relied on external statistical data as a basis for the age limits contained within their insurance products.

The following data was provided to me by insurers.

1. The percentage of disabled and handicapped persons as a percentage of the total population in each age group (ABS Cat No. 4120.0 *Disability and Handicap in Australia 1998*)
2. Data showing that as people grow older there is an increased tendency to develop conditions that cause disability (ABS Cat No. 4446.0 *Disability, Australia 2009*)
3. Statistics indicating that the proportion of people with profound/severe disability increases with age, most dramatically over 65 years (ABS Cat. No. 4367.0 *Aspects of Disability and Health in Australia, 2007–2008*)
4. United States information on the variance of disability rates by age, sex, race and ethnicity (John M McNeil *Americans with Disabilities 1991–92: Data from the survey of income and program participation*)
5. Hospital separations due to injury and poisoning, Australia 2004–05 (Clare Bradley and James Harrison, *Hospital Separations due to injury and poisonings, Australia 2004–05*, Flinders University, November 2008)
6. External causes of injury and poisoning (Australian Institute of Health and Welfare, *All External Causes of Injury and Poisoning (ICD V01-Y98), Australian Death Rates 2007*)
7. Causes of death by age group (ABS Cat. No. 3303.0 *Causes of Death 2009*)

The following sections examine this data as a basis on which to exclude volunteers in younger and older age brackets.

⁸⁰ *Anti-Discrimination Act 1998 (Tas)* s 34(1)(b).

Disability

Insurers advised that statistical data showing rates of disability within the community is used as a basis for excluding volunteers within defined age brackets.

The principal argument is that disability increases with age, most dramatically for those over 65 years.

Reliance on indicators of disability presumes that it is reasonable to exclude certain age groups from insurance coverage because they have a higher risk of acquiring a disability later in life.

The *2009 Survey of Disability, Ageing and Carers* (SDAC) released by the Australian Bureau of Statistics indicates that 3.4% of children under 4 years of age were affected by disability, compared with 40% of those aged 65–69 years and 88% of those aged 90 years and over. It therefore confirms that rates of disability do increase with age.⁸¹

To understand whether this forms a reasonable basis on which to argue reliance on the exception provided in the Tasmanian Act it is necessary to understand the nature of this relationship and whether it provides an acceptable basis on which to discriminate in the provision of insurance coverage for certain volunteers.

There are several matters related to the use of this data that warrant comment. The first relates to the definition of disability.

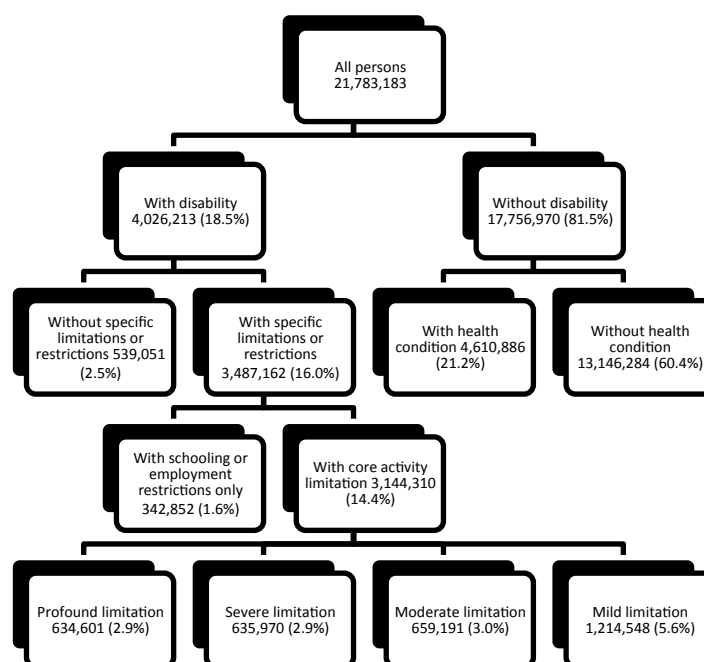
The Australian Bureau of Statistics defines disability as ‘any limitation, restriction or impairment which restricts everyday activities and has lasted or is likely to last for at least six months’.⁸² A person with disability under this definition ranges from those who have loss of sight that is not corrected by glasses, to arthritis which causes difficulty dressing, to advanced dementia that requires constant help and supervision.⁸³ It also includes those who have physical health conditions such as asthma, back pain and heart disease.

⁸¹ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings*, (Cat. No. 4430.0, 2009) released December 2010, 4.

⁸² Ibid 3.

⁸³ Ibid.

Figure 2: Disability prevalence⁸⁴



A variety of health conditions or diseases are encompassed within the definition of disability adopted by the Australian Bureau of Statistics. For the vast majority of people with disability, illness or injury does not prevent them participating in daily activities.

Figure 2 shows that in 2009 of 21,783,183 Australians, 14.4% or 3,144,310 had a core-activity limitation and of those 8.6% or 1,873,739 reported that limitation as being mild or moderate.⁸⁵

The proportion of population with the most severely disabling conditions—those people who always need help or supervision with their mobility, communication and/or self-care—represents approximately 2.9 per cent of the total Australian population (634,000 people in 2009).⁸⁶ The numbers in this category have remained relatively steady.

At the same time while just over half of people aged 60 years and over in 2003 had disability, most did not need assistance to manage health conditions or cope with everyday activities. The most commonly reported needs for those who do need assistance are help with property maintenance, household chores and mobility.⁸⁷

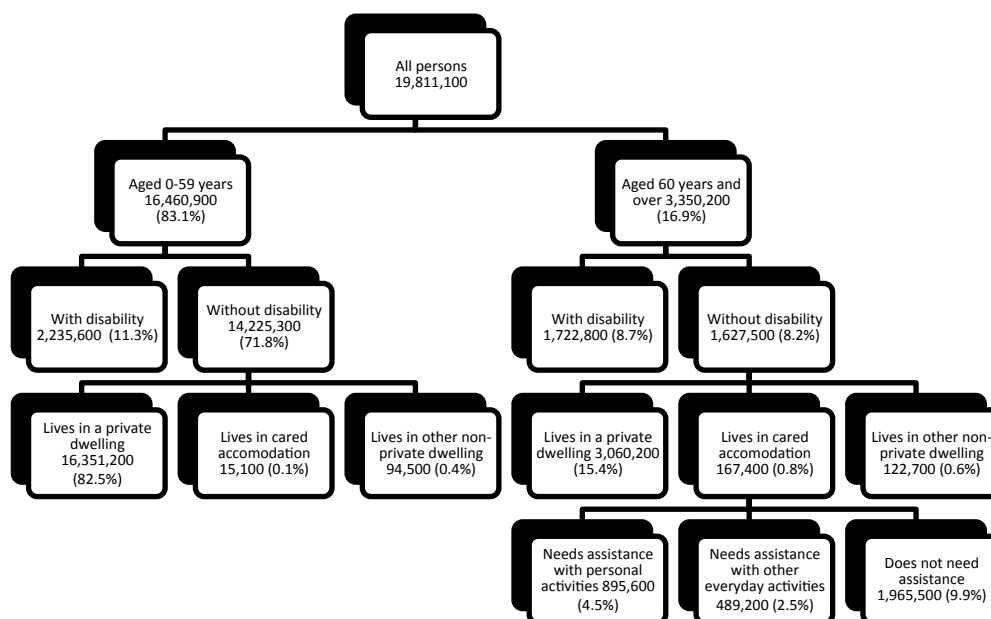
⁸⁴ Ibid 4.

⁸⁵ Ibid 4.

⁸⁶ Ibid.

⁸⁷ Australian Bureau of Statistics, 'One in five Australians with a disability' (media release, 2 May 2011).

88



The existence of a core activity limitation is not, however, a robust indicator of capacity to participate—or participate safely—in community activity. Of the 3.35 million people aged 60 years and over in the Australian population in 2003, 19% had a profound or severe core activity limitation that meant they always or sometimes needed help to undertake a core activity task such as getting in and out of bed or chair, showering or bathing or using public transport.⁸⁹ However, as the Australian Institute of Health and Welfare report, the most common diseases or condition reported by those with a profound or severe limitation was arthritis.⁹⁰

⁸⁸ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia* (Cat No. 4430.0, 2003) 4.

89 Core activities are communication, mobility and self-care. There are four levels of core activity limitation, based on whether a person needs help, has difficulty, or uses aids or equipment with any of the core activities. A person's overall level of core-activity limitation is determined by their highest level of limitation in these activities. The four levels of limitation are:

Profound: the person is unable to do, or always need help with, a core-activity task

Severe: the person sometimes needs help with a core-activity task; has difficulty understanding or being understood by family or friends; can communicate more easily using sign language or other non-spoken forms of communication.

Moderate: the person needs no help but has difficulty with core-activity task.

Mild: the person needs no help and has no difficulty with any of the core-activity tasks, but uses aids and equipment; cannot easily walk 200 metres; cannot walk up and down stairs without a handrail; cannot easily bend to pick up an object from the floor; cannot use public transport; can use public transport but needs help or supervision; needs no help or supervision but has difficulty using public transport. Source: ABS *Disability, Ageing and Carers, Australia* (Cat No. 4430.0, 2003) 72.

90 Australian Institute of Health and Welfare, *Older Australians at a Glance*, (4th ed, November 2007) 61.

There is little doubt that people over 85 years of age report a much higher need for assistance than those in the 60–69 year age bracket (84% compared with 26%).⁹¹ At the same time increased life expectancy also brings a lengthening of time spent with disability. The ageing of the Australian population suggests that a significantly increased proportion of elderly Australians will be living with a profound or severe core activity limitation in coming years.⁹²

Nevertheless, it is difficult to understand how rates of disability could be used as a basis for identifying older people as a group that is of such high and conclusive risk that they warrant exclusion from coverage when participating in volunteer activity. Nor is it possible to substantiate an argument that people with disability are unable to continue participating in the community, or in work either paid or unpaid, without posing a higher or unacceptable insurance risk.

Around 2.2 million Australians of working age (15–64 years) have a disability.⁹³ For the purposes of this investigation these are people who would qualify for personal injury coverage as a volunteer. Over one million working-age people with disability were in paid work in 2009, comprising about 10% of the total Australian workforce.⁹⁴ Of those not working, around 20% had no employment restriction, meaning that it was not their disability that prevented them from engaging in the workforce.

Whilst Australians are more prone to acquiring conditions or illness that may be labelled as disability as they age, the vast majority of Australians are living longer and healthier lives and the perception that they are incapable of living independently or with minimal assistance is in many cases inaccurate. As is the perception that a person with a disability represents an increased risk of injury or harm whilst participating in community activity.

Social and economic exclusion, including from participation in volunteering activities, should not be seen as an inevitable outcome of impairment or a barrier to participation. Nor should it necessarily be associated with increased risk as a result of that participation.

Risk is often reduced by changes to the design of workplaces and workplace processes and by the provision of appropriate supports to a person with disability. These risk-reduction actions include, for example, the provision of mobility aids reducing barriers to participation in activities outside of the home, effective treatment for mental illness reducing barriers to participation and proper workplace safety practices and removal of physical hazards and barriers ensuring the work is safer not only for a person with disability but for all workplace participants.

People with disability are in many cases fully engaged in activities across the community and where they are not, it is attitudes and systemic and physical barriers

⁹¹ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia* (Cat No. 4430.0, 2003) 3.

⁹² Australian Institute of Health and Welfare, *Older Australians at a Glance*, (4th ed, November 2007) 62.

⁹³ Australian Bureau of Statistics, *Australian Social Trends: Disability and Work* (March quarter 2012).

⁹⁴ *Ibid* 6.

that prevent this from occurring, rather than any increased risk inherent to the person's disability.

Deficit-based perceptions of disability create barriers to participation and deny people with disability the opportunity to fully participate in social, sporting, economic and cultural life.

A key principle of the National Disability Strategy is to ensure that program and service barriers do not pose unnecessary obstacles to these rights:⁹⁵

Australia should be a country where it is not unusual to see people with disability as participants, organisers and leaders in all parts of civic life including cultural, religious, recreational, political, professional and sporting spheres.

There is a risk in using a single term such as disability to encompass a broad target population as it implies similarities between or within the subgroups that may not necessarily exist. People with disability are not a homogenous group. Conditions differ, circumstances differ, and the requirement for assistance varies. Just as it is not possible to make a generic assessment of needs, nor is it possible to make generic assumptions about the capacity of a person with disability to contribute toward the work of voluntary organisations.

Injuries, falls and accidental death

A number of industry submissions raised the increased likelihood of accident, injury, hospitalisation and death in both younger and older age cohorts as a primary factor in the decision to exclude particular age groups from insurance coverage. This, it is argued, substantiates a view that there is a materially increased risk in providing personal accident cover to both younger and older persons.

For younger persons, substantially the argument is that young people are generally less skilful in performing work and require a higher degree of supervision and as a consequence are more likely to sustain an injury than other volunteers. This in turn supports the view that providing any cover to young people presents an unacceptable risk to insurers.

For older persons, the argument is that older people have the highest rates of injury and that the rate increases with age. Further, older age groups have longer stays in hospital as a result of injuries as it takes longer for people over the age of 65 to recover. Insurers also argue that there is an increasing incidence of death from all causes, including death by accidental causes, for people over the age of 75 years. The combination of higher incidences of injury, longer hospital stay and increased likelihood of death supports an underwriting view that there is a significantly higher likelihood of claims occurring and increased cost of claims for those aged 65 years and over.

⁹⁵ Council of Australian Governments, *National Disability Strategy 2010-2020* (Commonwealth of Australia, 2011) 18.

For data to be relied on as the basis for the exception provided in section 34 of the Tasmanian Act, it must be data on which the decision to discriminate is 'based'. That is, that the discriminator must have actually used this data in its decisions to exclude certain age categories from coverage.

Insurers have advised that they rely on statistical data relating to the health status of Australians as a basis for the imposition of age limits in insurance coverage for volunteer workers. It is, therefore, data within the meaning of section 34(1)(a) of the Tasmanian Act.

Community injury

Comprehensive analysis of injury data has been undertaken on behalf of the Australian Institute of Health and Welfare, focussing on hospital separations due to injury and poisoning.⁹⁶

Whilst hospitalisation data provides information on only a small proportion of injuries, for example, excluding injuries treated by GPs or injuries resulting in death that are not recorded in hospital statistics, they account for a significant proportion of the cost of injury.

Injuries examined by the AIHW cover those that contain an ICD-10-AM diagnosis code.⁹⁷ This diagnosis code covers hospital separations related to injury for the following source:⁹⁸

- Community injury: 82.6% of all injury separations;
- Complications of surgical and medical care separations: 16.3% of all injury separations;
- Residual injury separations: 1.1% of all injury separations.

In 2005–06, 484,136 hospital separations were due to injury and poisonings. This represented 6.6% of all hospital separations (7,311,983).⁹⁹

Of the separations due to injury and poisoning, the majority (400,019 or 82.6%) were for community injury.¹⁰⁰

Community injuries are injuries that are sustained in the home, workplace or street. They include injuries that are either unintentional, for example, motor vehicle accidents or falls, and those considered to be intentional, for example, assaults or incidents of self-harm.

In 2005–06, episodes of hospital care attributable to community injury accounted for 5.5% of all hospital separations, ranking fourth in the total number of hospitalisations for all causes.¹⁰¹

⁹⁶ Renate Kreisfeld and James E Harrison, *Hospital separations due to injury and poisoning 2005-06* (Australian Institute of Health and Welfare, Canberra 2010).

⁹⁷ Ibid 1.

⁹⁸ Ibid 3.

⁹⁹ Ibid

¹⁰⁰ Ibid

Table 6: Community Injuries

Indicator	Persons
All hospital separations	7,311,983
Separations from hospital due to community injury	400,019
Percentage of all separations	5.5
Estimated community injury cases (this figure excludes transfers from acute hospitals and is used as a more accurate figure for no. of separate cases as it does not double count separation as a result of transfer)	371,297
Total patient days	1,498,862
Mean length of stay (days)	4.0

The six most commonly reported causes of injury in 2005–06 for all age groups were:¹⁰²

1. Falls: 36%;
2. Transportation: 14%;
3. Intentional self-harm: 6%;
4. Assault: 6%;
5. Poisoning, pharmaceuticals: 2%;
6. Fires, burns and scalds: 1%.

Rates of community injury varied across age groups. The highest rates of hospitalisation for community injury were in the 25–64 year age group. Those in the 65+ age group sustained 24% of community injury resulting in hospitalisation; followed by youth aged 15–24 years (18%) and children aged 0–14 years (16%).¹⁰³

It is noteworthy that the sex distribution of community injury is uneven, with significantly more males hospitalised for community injury, particularly in 15–30 year age brackets.¹⁰⁴ At around 65 years of age, this trend begins to reverse with injury and poisoning rates for females outnumbering those for males in older age brackets.¹⁰⁵

¹⁰¹ Ibid 2.

¹⁰² Ibid 5.

¹⁰³ Ibid 7.

¹⁰⁴ Ibid 5.

¹⁰⁵ Ibid 6.

Table 7: Case counts by age group for all major causes of community injury, Australia

Age group (years)							
External cause	0–4	5–14	15–24	25–44	45–64	65+	Total
Unintentional							
Falls	*7,396	*16,556	8,157	13,573	*20,100	*66,784	132,566
Transportation	991	7,213	*13,899	*16,590	8,940	4,621	52,254
Poisoning pharmaceuticals	1,320	217	1,107	1,819	924	971	6,358
Poisoning, other substances	437	117	424	680	460	280	2,398
Fire, burns, scalds	1,433	609	849	1,297	793	476	5,457
Drowning	232	55	65	67	53	22	494
Other unintentional injuries	6,876	12,939	25,807	37,681	23,687	12,497	119,487
Intentional							
Intentional self-harm	6	621	6,699	10,680	4,856	916	23,778
Assault	256	464	7,332	10,818	2,854	356	22,080
Undetermined intent	70	122	1,295	1,940	771	232	4,430
Other	34	51	149	316	595	850	1,995
Total	19,051	38,964	65,783	95,461	64,033	88,005	371,297

Table 7 outlines the case counts by age group across all major categories of community injury.¹⁰⁶ Asterisked cells indicate the leading cause of identifiable injury for each age group.

Falls constitute the leading cause of community injury for those 0–15 years and 45–65+, accounting for 87% of all community injury hospitalisations. Injury arising from transportation (largely accidents) was the leading cause of community injury for those in the 15–44 year age brackets, accounting for 14% of all hospitalisations for community injuries.¹⁰⁷

The principal diagnosis for those injured also varies by age, with those in the 5–14 year age bracket most likely to sustain injuries to the elbow and forearm followed by injury to the head, those in the 15–24 year age bracket more likely to sustain injuries to the head, followed by injuries to the wrist and hand. For those in the 65+ age group the most common diagnosis was injury to the hip and thigh, followed by injury to the head.¹⁰⁸

The mean length of stay for those hospitalised through community injury increased with age. The mean length of stay for those in the 0–14 year age bracket was 1.8

¹⁰⁶ Ibid 7.

¹⁰⁷ Ibid 11.

¹⁰⁸ Ibid 12.

days, 2.3 days for those aged 15–24 years, 2.7 days for those aged 25–44 years, 3.7 days for those aged 45–64 years and 8.6 days for those aged 65+. ¹⁰⁹

Whilst less reliable, figures are also available for the place of occurrence of the injury. This data shows that the highest proportion of community injury occurs in the home (26.3%), on a street or highway (10.4%) or in a sports or athletics area (5.4%). There appears, however, to be significant differences in terms of males and females with regard to the place of injury, however, with more females than males being injured in the home and more males than females being injured in a sports or athletics area. ¹¹⁰

As variations exist in the age patterns of injury, the situation of each age-cohort is examined separately.

Children (0–14 years)

Injury and poisoning accounted for 12% of hospitalisations of children in 2007–08 and was the leading cause of hospitalisations for children aged 10–14 years that year. ¹¹¹

The most common form of injury was from falls, accounting for about 39% of all injury hospitalisations for children. Land transport accidents (traffic and non-traffic) account for a further 13% of hospitalisations due to injury. ¹¹²

Falls among children in the 0–14 year age bracket accounted for around 18% of all falls injuries (23,952 falls in 2006–07). ¹¹³ Most falls were sustained in either the home or at school or in sports or athletic areas. ¹¹⁴ Fracture of the forearm (10,019) was the most common injury, followed by fracture of the shoulder and upper arm (2,816) and open wound of the head (2,357). ¹¹⁵

The mean length of hospital stay for children 0–14 involved in falls was 1.5 days, the lowest of any age cohort. ¹¹⁶

Approximately 14% of all hospitalisations for injuries were unintentional transport-related injuries (52,254 cases). ¹¹⁷ Around 15.7% (8,204) of transport injuries involved children in the 0–14 year age bracket. ¹¹⁸ Of these: 3,518 involved pedal cycle injuries; 1,602 involved motorcycle injuries; 1,067 involved injuries sustained by riding animals or as a result of being a passenger in an animal driven vehicle

¹⁰⁹ Ibid 13.

¹¹⁰ Ibid 14.

¹¹¹ Australian Institute of Health and Welfare, *Australia's Health 2010* (Canberra, 2010) 298.

¹¹² Ibid

¹¹³ Renate Kreisfeld and James E Harrison, *Hospital separations due to injury and poisoning 2005–06* (Australian Institute of Health and Welfare, Canberra 2010) 18.

¹¹⁴ Ibid 21.

¹¹⁵ Ibid

¹¹⁶ Ibid 26.

¹¹⁷ Ibid 5.

¹¹⁸ Ibid 31.

(usually falling or being thrown from a horse); 1,008 were sustained by a car; and 658 as a pedestrian.¹¹⁹

The mean length of hospital stay for children with transport-related injuries was 2.7 days. This was the lowest of any age cohort.¹²⁰

Around 2% of community injury hospitalisations in 2005–06 were as a result of accidental poisoning.¹²¹ The highest rates of injury in this category was for 0–4 year olds accounting for around 20.8% of all hospitalisations in this category, but much lower for children aged 5–14 years (3.4%).¹²² Almost all instances of poisoning in very young children occurred in the home (82.2%).¹²³

The mean length of hospital stay for children who were injured as a result of accidental poisoning was 1.2 days. Again this was the lowest among all age cohorts.¹²⁴

Of the other leading forms of unintentional injury among children (hospitalisations arising from contact with toxic substances; fires burns and scalds; and accidental drowning) the highest rates of injury were also found in the 0–4 age group, followed by a significant decline in instances in the 5–14 year age bracket.¹²⁵ For example, around 47% of all drowning occurred in the 0–4 year age bracket.¹²⁶

Younger people (15–24 years)

Injury and poisonings accounted for around 14.7% of hospitalisations of young people in 2005–06.¹²⁷

The pattern of injury in young people aged 15–24 years differs somewhat from that for younger children due to the increased incidence of injury sustained through transport-related accidents. After injuries classified as ‘other’, transport-related accidents were the highest cause of hospitalisation due to injury in the 15–24 year old age range, accounting for 13,899 of the 65,783 major cases of community injury in the 15–24 year old age range in 2005–06.¹²⁸

Discernible differences are noticed between males and females in relation to this form of injury. Males have a higher rate of transport accidents in all age groups, with the rate of transport-related injury peaking for males in the 15–24 year age group. Rates of transport-related injury at this age are almost twice that of females of the same age range.¹²⁹ The highest proportion of transport-related injuries in this age

¹¹⁹ Ibid 33.

¹²⁰ Ibid 35.

¹²¹ Ibid 5.

¹²² Ibid 49.

¹²³ Ibid 57.

¹²⁴ Ibid 55.

¹²⁵ Ibid 72.

¹²⁶ Ibid 76.

¹²⁷ Australian Institute of Health and Welfare, *Australia's Health 2010* (Canberra, 2010) 306.

¹²⁸ Renate Kreisfeld and James E Harrison, *Hospital separations due to injury and poisoning 2005–06* (Australian Institute of Health and Welfare, Canberra 2010) 31.

¹²⁹ Ibid

involved either driving or being an occupant of a car or motorcycle. Eleven times more males than females were hospitalised due to motorcycle accidents.¹³⁰ The mean length of stay in hospital for transport-related injuries to young people aged 15–24 years was 3.9 days.¹³¹

The third largest category of community injury to young people was falls. Of the 8,157 young people injured by fall in 2005–06: 1,396 fractured their forearm; 1,173 fractured their lower leg; and 652 suffered intracranial injury.¹³² The leading cause was through collision with another person, largely through sporting activities.¹³³

Young people aged 15–24 years also have slightly higher rates of injury through poisoning accounting for 17.4% of all poisoning by pharmaceuticals and 17.7% of cases related to poisoning by other substances in 2005–06, with one of the leading cause of poisoning being alcohol and poisoning by unspecified chemicals and noxious substances.¹³⁴ However the mean length of hospital stay was the second lowest of any age bracket at 1.5 days for poisoning by pharmaceuticals and the lowest of any age bracket at 1.3 days for unintentional poisoning by other substances.¹³⁵

Intentional self-harm accounted for 6.2% of all injury hospitalisations in 2005–06 (24,924 cases) and assaults also accounted for 5.8% of hospitalisations (23,369 cases).¹³⁶ The highest proportion of injury by intentional self-harm occurred in the 25–44 year age group (44.9% of cases); followed by the 15–24 year age group (28.2% of cases); with those aged 45–64 also accounting for 20.4% of hospitalisation due to intentional self-harm.¹³⁷ Assaults were particularly high for those aged 25–44 years, accounting for 49.0% of cases, with those in the 15–24 year age group accounting for 33.2% of cases of hospitalisation as a result of assault.¹³⁸ Females, however, accounted for disproportionately more injuries due to self-harm and males sustaining significantly more injuries due to assault.¹³⁹

Older people

The statistics for community injury sustained by older Australians also show a number of distinct patterns.

As indicated earlier, 24% of community injuries are sustained by those aged over 65 years. What is different in relation to this age cohort, however, is the high proportion of falls relative to other forms of community injury. Thus whilst 87% of hospitalisations for community injury in the 85+ age group were for falls, only 2% of transport-related injuries occurred in this age group.¹⁴⁰ Over half of the fall-related

¹³⁰ Ibid

¹³¹ Ibid 35.

¹³² Ibid 21.

¹³³ Ibid

¹³⁴ Ibid 49 and 59.

¹³⁵ Ibid 55 and 64.

¹³⁶ Ibid 95.

¹³⁷ Ibid 96.

¹³⁸ Ibid 104.

¹³⁹ Ibid 95 and 103.

¹⁴⁰ Ibid 9

injuries (50.4%) occurred in the 65+ age group; whereas this age group sustained the lowest rates of community injury related to fires, burns and scalds (8.7%);¹⁴¹ drowning (4.5%);¹⁴² and other unintentional injuries.¹⁴³

As the rate of falls among the elderly are of particular relevance to this investigation, it is worth exploring this issue further.

Falls accounted for one in every 10 days spent in hospital by a person over 65 years. With the mean length of stay per fall estimated at 7.4 days.¹⁴⁴ Added to this is a significant number of days in fall-related follow-up care, bringing the total number of hospital days for fall by those over 65 years to more than 1.2 million days. Females have a consistently higher rate of hospitalisation for falls over all age groups, but particularly for those in the 65+ age category.

The rates and severity of falls rates also increase with age.¹⁴⁵ The highest rate of hospitalised cases for falls in 2008–09 was in the 95+ age bracket, with the overall mean age of all persons aged 65 years and older hospitalised due to a fall-related injury being 81.9 years.

The largest injury type for those hospitalised due to a fall were injuries to the hip and thigh, representing about 29% of all fall cases in this age bracket. The second most common type of injury was injuries to the head (19%).¹⁴⁶

It is estimated that acute care for fall-related injuries for older people cost the Australian economy in excess of \$648 million in 2007–08, with indirect costs adding significantly to this figure.¹⁴⁷

It is important, however, that the high rates of falls in people over 65 years of age be considered in context.

As outlined earlier, community injury represents approximately 5.5% of all hospital separations across all age groups and covers a wide range of causes. For those in the 65+ age group fall injury accounted for only 2.6% of all hospital separations.

Looked at another way, of the almost three million hospital separations recorded for those over 65 years in 2008–09, 78,606 were related to fall injury cases in people over 65 years of age, representing 4.7% of all hospital patient days for those aged 65 years and over.¹⁴⁸

The number and severity of falls does increase with age. However, this is largely consistent with the fact that people in older age brackets make relatively high use of

¹⁴¹ Ibid 68.

¹⁴² Ibid 79.

¹⁴³ Ibid 85.

¹⁴⁴ Australian Institute of Health and Welfare, *Hospitalisations due to falls by older people, Australia 2008-09* (Injury research and statistics series no. 62, Canberra, 2010) 39.

¹⁴⁵ Ibid 4.

¹⁴⁶ Ibid 5.

¹⁴⁷ Ibid 1.

¹⁴⁸ Ibid 3.

hospital services.¹⁴⁹ In overall terms, separation rates for older persons is much higher than the national average (340 separations per 1,000 population compared with 926 separations per 1,000 population for those over 65 years)¹⁵⁰, and the average number of days per stay is longer (in 2004–05 patients over 65 years of age accounted for 48% of all patient days).¹⁵¹

It is important that the injury data be seen in the context of the health status of an ageing population. The majority of hospital separations in older age groups are not for acute care, but for procedures known as maintenance or rehabilitation.¹⁵² Over 60% of hospital separations involve medical examinations, care involving dialysis or rehabilitation (known as factors influencing health status and contact with health services); diseases of the circulatory system; cancers; and/or diseases of the digestive system.

Not all health conditions limit the ability to participate fully in the community. Nor do they automatically increase risk or necessarily lead to an increase in the number of insurable events.

The most commonly reported long-term health conditions reported by older Australians (65+) were sight or hearing loss (53% of males and 57% of females), followed by deafness (43% for older males) and high blood pressure or related hypertensive conditions (38% of older females).¹⁵³

Nor do falls and injuries predominantly occur in public or community settings. Almost 50% of hospitalisations due to falls resulted from incidents that occurred in the home (most commonly in bathroom, bedroom or outdoor area) and a further 22% of falls occurred in aged-care facilities. Just over 4% occurred in a trade or service area (shop, café, etc) and relatively few falls occur on footpaths (3.6%) or roadways (1.3%) or other public areas.¹⁵⁴

Whilst the data describing the activity being undertaken when the fall occurred is not robust, information available suggests that 45% of falls by those over 65 years occurred whilst resting, sleeping or eating and 17% occurred whilst engaged in 'other' work (that is work that did not generate an income).¹⁵⁵

At the same time, the self-assessed health status of Australians aged 55 years and over in 2004–05 indicates that the majority of older Australians consider their health to be good, very good or excellent.¹⁵⁶

¹⁴⁹ Australian Institute of Health and Welfare, *Older Australia at a glance* (4th ed, Canberra, November 2007) 114.

¹⁵⁰ Ibid.

¹⁵¹ Ibid 115.

¹⁵² Ibid 116.

¹⁵³ Australian Institute of Health and Welfare, *Australia's Health 2010* (Canberra, 2010) 321.

¹⁵⁴ Australian Institute of Health and Welfare, *Hospitalisations due to falls by older people, Australia 2008–09* (Injury research and statistics series no. 62, Canberra, 2010) 14.

¹⁵⁵ Ibid 17.

¹⁵⁶ Australian Institute of Health and Welfare, *Older Australia at a glance* (4th ed, Canberra, November 2007) 58.

Australians are becoming increasingly healthier and the major causes of ill-health do not result from injury, but from disease processes arising from long-term or chronic conditions and the effects of exposure to risk factors such as lack of nutrition, inadequate diet, lack of physical activity, and tobacco, alcohol and other drug use.

Table 8: Self-assessed health status of Australians aged 55 and over, 2004–05

	55–64	65–74	75+	65+
Excellent/very good	47.2	38.8	31.3	35.5
Good	28.3	30.5	33.4	31.8
Fair/poor	24.5	30.7	35.2	32.7
Total	100	100	100	100

Source: Australian Institute of Health and Welfare, *Older Australia at a glance*. Self-assessed health status of Australians aged 55 and over, 2004–05 (percentage)

Further, public health authorities emphasise the importance for older people of maintaining healthy and active lifestyles as a key protective factors that will assist in bringing down health costs. Activities such as volunteering are known to improve mental health, promote increased social interaction and prolong independent living; all of which are likely to have positive impacts on health status.

Nor is injury to older and younger Australians unique to specific age groups. Injury arising from transportation (largely accidents) was the leading cause of community injury for those in the 15–44 year age brackets, accounting for 14% of all hospitalisations for community injuries and falls also constitute the leading cause of community injury for those in the 45–65+ age bracket.¹⁵⁷

Workers' compensation

Information on age and compensation claims for paid workers is also illustrative.

Whilst young workers report high rates of injury¹⁵⁸, Tasmanian workers' compensation data shows that incidence rates of serious workers' compensation claims are lowest among employees aged 15–19 years.¹⁵⁹ In 2009–10, the incidence rate of claims for workers in this age range was 6.9 per 1,000 employees, representing less than 5% of all serious claims. Claim numbers for serious injuries reached up to 16% of all claims for injuries to female employees in 45–49 years and 50–54 year age groups, before significantly reducing for all employees in the 60+ age range. In fact younger workers up to the age of 24 years have an average likely cost of Lost Time Injuries (LTI) of around half that for an average worker. In 2011,

¹⁵⁷ Renate Kreisfeld and James E Harrison, *Hospital separations due to injury and poisoning 2005–06* (Australian Institute of Health and Welfare, Canberra 2010) 7.

¹⁵⁸ Safe Work Australia, *Australian work-related injury experience by sex and age, 2009–10* (Safe Work Australia, July 2012) 20.

¹⁵⁹ Workcover Tasmania, *Workplace Injuries Statistical Report 2011* available at <www.workcover.tas.gov.au>.

for example, the average likely cost of injury to a worker less than 20 years of age was \$9,414 whilst the average likely cost of all workers was \$22,445.¹⁶⁰

Workers over 65 years of age reported the lowest frequency and incidence of work-related injury of all age-groups and around half the injuries to workers over 55 years of age involved no time lost from work.¹⁶¹ Claims relating to serious injury to workers aged 60–64 years were around 6% and for workers aged 65 years and over were as low as 2%.¹⁶²

Age and capacity

There is little to dispute the position that underlying the ageing process is an increased propensity to ill health. Even less to deny that ageing ultimately results in death. It is important, however, to understand the nature of these health risks and the extent to which they have the capacity to impact on the likelihood of increased personal injury and accident claims in respect of volunteering.

The data available to me suggests that age is only one of a number of determinants of capacity and risk and that there may be other equally important determinants of health and risk including fitness, lifestyle, quality of health care, avoidance of chronic disease, socio-economic status and, importantly, the nature of the activities undertaken.

Evidence presented by the Australian Institute for Social Research in July 2008 indicates that the health impacts of ageing are specific to individuals and influenced by a number of factors. Ageing does not have a uniform impact on functional capacity, and ageing *per se* is not the only or even the most significant determining variable of decline in capacity. Functional limitations are affected by a range of factors unrelated to age, including levels of physical activity and other lifestyle-related factors.¹⁶³

Examining in detail the findings about health change due to ageing, Barnett *et al* look at a range of functions and the impacts that ageing may have on capacity to undertake work. Importantly, the research also looks at the workplace implications and how these can be modified to address functional limitations.

Reduced respiratory and cardiovascular function, for example, means that older workers are likely to have a reduced ability to undertake heavy work particularly at high speed. Modifications including job re-design, the use of assistive technologies, restrictions on lifting and physically exerting tasks, training in lifting, increased breaks and promotion of exercise and fitness are all ways in which work can be adapted to meet these restrictions.

¹⁶⁰ Ibid 17.

¹⁶¹ Safe Work Australia, *Australian work-related injury experience by sex and age, 2009–10* (Safe Work Australia, July 2012) viii.

¹⁶² Safe Work Australia, *Australian work-related injury experience by sex and age, 2009–10* (Safe Work Australia, July 2012) viii.

¹⁶³ Kate Barnett, John Spoehr and Eric Panis, *Exploring the impact of an ageing workforce on the south Australian workers compensation scheme: Ageing and the capacity to work* (University of Adelaide, July 2008).

Declining sensory and sensorimotor ability as part of the ageing process may mean deterioration in vision, hearing or balance all of which may have implications for workplace design, increased awareness, appropriate protective equipment, appropriate workplace lighting, clear workplaces, non-slip surfaces and so forth.

Declining musculoskeletal capacity can lead to decreased strength and movement and increased time to repair damaged tissue. It may also be associated with declining bone density with associated impacts on mobility and increased propensity for falls. Appropriate design of work activity and accommodation, training and the promotion of preventative approaches are all relevant in this area.

What the research highlights is that the health and safety of all workers—paid or unpaid—requires active management, that capacity must be matched to function; and that risks must be actively monitored and managed. When risks are addressed in this way, differences between the accident rates for different age cohorts largely disappear.

There is no evidence to support the view that older volunteers are a higher risk than any other age group. Increased risk comes from functional loss arising out of medical conditions rather than chronological age. Age alone is not a predictor of risk. Risk is evident across all age-groups. It may manifest itself differently and have an impact on what a person is able to do. For example, a middle-aged person with several driving convictions may not be the best placed to volunteer in a capacity that requires long hours behind the wheel of a vehicle, a person who demonstrates increased frailty may not be the right person to participate in volunteering activities that require a great deal of walking or physical exertion. A person with a history of problems with their spine will not be the best person to volunteer in a role that requires lifting. But these factors are related to capacity or ability, not chronological age.

There is great variation in the ability of people to contribute productively, whether in the paid workforce or outside it. Differences in individual capacity far outweigh the differences between age groups. This is particularly so as life expectancy increases and innovations in treatments and other interventions improve health outcomes.

When viewed from a medical perspective, ageing is associated with disease and disability. Evidence that many older people continue to live active and productive lives goes unchallenged. There are many older persons who are healthy and age alone is a poor basis on which to predict capacity or risk.

Causes of death

Some insurers rely on statistical data showing age-specific death rates to support the imposition of age limits within their insurance products.

Table 9 presents age-specific data for accidental death rates for persons over 50 years of age provided by one insurer as the basis on which decisions are made to refuse coverage to those in older and younger age groups.

The data demonstrates an increasing trend in anticipated accidental deaths based on age and shows that incidence of accidental death for males aged 75–79 years are 110% greater than those of males aged 50–54. For females within these same age bands the corresponding increase is 135%.

Table 9: Age-specific accidental death rates

Age group	Males	Females
50–54	48.4	22.5
55–59	43.1	18.4
60–64	44.3	22.8
65–69	51.3	21.1
70–74	59.1	30.4
75–79	101.9	53.5
80–84	167.7	109.2
85+	413.3	342.7

Age-specific accidental death rates per 100,000 persons for males and females aged over 50

Source Australian Institute of Health and Welfare, *All External Causes of injury and poisoning* (ICD V01-Y98), Australia Death Rates 2007.

Table 10 provides data supplied by insurers on deaths by all causes per 100,000 persons. Insurance industry participants submitted that this table indicates that death rates for ages 75–84 are 1,653% greater than for those aged 45–54.

Table 10: Death from all causes

Age Group	Persons
45–54	237.6
55–64	526.7
65–74	1,365.9
75–84	4,165.1
85–94	12,132.9
95+	28,426.5

Source: Australian Bureau of Statistics, *Causes of Death (per 100,000)* Vol 3303.0, 2009

As outlined in earlier sections, for data to be relied on as the basis for the exception provided in section 34 of the Act, it must be data on which the decision to discriminate is ‘based’. That is, that the discriminator must have actually used this data in its decisions to exclude certain age categories from coverage.

Insurers have advised that they rely on statistical data, including that provided by the AIHW and the ABS in the above tables, to support the imposition of age limits. It is, therefore, data within the meaning of section 34(1)(a) of the Tasmanian Act.

However, as I have also pointed out, the Act requires that decision to discriminate must be reasonable having regard to the data and other relevant factors.

Data provided by the ABS and AIHW (using ABS data cubes) is generally of sufficient quality and robustness to meet the requirement that it is reliable. However, I have serious reservations about the extent to which the data possesses the level of detail to be relevant to a decision made in accordance with section 34 of the Tasmanian Act.

Accidental death rates

The information provided in Table 11 is based on a high-level summary of causes of death data sourced from the ABS.¹⁶⁴ Further examination of ABS statistics reveals the limitations of using high-level summary data in this manner.

The *International Statistical Classification of Diseases and Related Health Problems*, 10th revision (known as ICD-10) is a medical classification list maintained by the World Health Organisation for all general epidemiological, many health-management purposes and clinical use.¹⁶⁵ It is used to classify diseases and other health problems recorded on many types of health and vital records, including death certificates and health records. In addition to enabling the storage and retrieval of diagnostic information for clinical, epidemiological and quality purposes, these records also provide the basis for the compilation of national mortality and morbidity statistics by WHO Member States. The latest version came into use in WHO Member States starting in 1994. Australia introduced its first edition of ICD-10 in 1998.

ABS Causes of Death data are classified using ICD-10.¹⁶⁶

Statistics provided by insurers are based on the classification codes ICD VO1-Y98.¹⁶⁷ These codes identify external causes of morbidity and mortality and permit the classification of environmental events and circumstances as the cause of injury, poisoning and other adverse effects. It includes deaths caused by suicide, transport accidents, falls, accidental poisoning and assault.

In 2009, external causes of death accounted for 8,884 deaths or 6.3% of all registered deaths in Australia.

Of these transport accidents accounted for 16.9% of all external causes of death (1.1% of all registered deaths) and was the only external cause of death to be identified in the top 20 causes of death. Falls accounted for 1,370 deaths (1.0% of all deaths); accidental poisoning accounted for 799 deaths (0.6% of all registered deaths); assaults accounted for 211 deaths (0.5% of all registered deaths). Suicide represented a significant proportion of deaths due to injuries (2,132 deaths), although the ABS warns that care should be taken in interpreting suicide death data.

ICD-10 contains 12,421 codes distributed across 2,036 categories. Manipulation of data using of the codes enables highly detailed analysis of causes of death.

¹⁶⁴ Australian Bureau of Statistics, *Causes of Death* Vol 3303.0, 2009 (2011).

¹⁶⁵ See <<http://www.who.int/classifications/icd/en/>> for information regarding the development and implementation of ICD-10.

¹⁶⁶ Australian Bureau of Statistics, *Causes of Death* Vol 3303.0, 2009, (2011).

¹⁶⁷ Australian Bureau of Statistics, *Causes of Death* Vol 3303.0, 2009, (2011), 3.

The level of specificity within the data enables standard tabulation lists to be prepared to assist in monitoring cause-specific mortality and inform the development of health and other public policy.

For example, the United States Centre for Health Statistics has developed tabulation lists to enable the aggregation of data for specific risks.¹⁶⁸ Tabulation lists enable death rates to be examined for each age-group by mechanisms and intent of death. In relation to external causes of death, for example, the latter category providing information on whether the underlying cause of death was intentional (for example, through suicide or homicide) or unintentional. As an example, a 'death by firearms' tabulation list would bring together the following codes:¹⁶⁹

- W32-W34, Accidental discharge of firearms;
- X72-X74, Intentional self-harm (suicide) by discharge of firearms;
- X93-X95, Assault (homicide) by discharge of firearms;
- Y22-Y24, Discharge of firearms, undetermined intent; and
- Y35.0, Legal intervention involving firearm discharge.

The availability of this data and its manipulation into internationally recognised standard tabulation lists suggests that options are available to the insurance industry to develop detailed assessment of risk associated with volunteering activities beyond the broad data made available as part of this investigation.

I do not consider that statistics used as the basis for calculating risks associated with insuring particular age groups that include a significant number of deaths caused by factors outside those that could conceivably be covered under the terms of volunteer insurance is an acceptable basis on which to claim application of the exception under the Tasmanian Act.

The majority of deaths in people over 65 years of age or older occur naturally; injuries and poisonings are not the most common form of death for persons in this age group. It is, however, the most common cause of death for those in the age groups 1–14 and 15–24 years and for males aged 25–44 (Table 11).¹⁷⁰ Cancer is the most common cause of death for females aged 25–44, and for males and females aged 45–64 and 65–84; and cardiovascular disease, which includes ischaemic heart disease and stroke, is the prominent cause of death for persons aged older than 84 years.¹⁷¹

¹⁶⁸ A M Minino, R N Anderson, M A Fingerhut, M A Boudreault and M Warner, *Deaths: Injuries 2002, National Vital Statistics Reports*, Vol 54 no 10, National Center for Health Statistics (2006).

¹⁶⁹ Australian Bureau of Statistics, *Causes of Death*, Vol. 3303.0, 2009 (2011) 51

¹⁷⁰ Australian Institute of Health and Welfare, *Mortality Database*, available at <www.aihw.gov.au/deaths>.

¹⁷¹ Ibid.

Death rates

Table 10 compares deaths by all causes per 100,000 persons. Industry submissions suggest this table indicates that death rates for ages 75–84 are 1.653% greater than for those aged 45–54.

This is indisputable. Death is inevitable. However, for the purposes of claiming the exception under the Act applies, it is necessary for the data to be able to inform the decisions made by the insurance industry in the policies they offer.

Crude death rates are simply the number of deaths registered. They say little about whether these deaths may be linked to any of the risks associated with undertaking the wide diversity of voluntary activities or whether they are linked to compensable events.

The purpose of collecting death statistics is largely to provide information on a regular basis regarding the number and causes of death. These are used to determine annual time series data relating to matters such life expectancy, leading causes of death, years of potential life lost (premature mortality) and so on. It also enables a comparison across age groups of the leading causes of death, for example. This data is used to inform prevention strategies, public policy responses and so on.

So, for example, using the table it is possible to confirm that there were 237.9 deaths per 100,000 for the 45–54 years age group; 526.7 deaths per 100,000 for the 54–64 years age group and so on as per the table compiled above.

What is more interesting, however, is that for each of these age groups the ABS has used causes of death data to provide information on the 10 leading causes of death for each age category:¹⁷² This shows, for example, that the 10 leading causes of death for those aged between 45 and 54 years are as follows:

- Malignant neoplasms of digestive organs (C15-C26)
- Ischaemic heart diseases (I20-I25)
- Malignant neoplasms of respiratory and intrathoracic organs (C30-C39)
- Malignant neoplasms of breast (C50)
- Intentional self-harm (X60-X84)
- Diseases of the liver (K70-K77)
- Cerebrovascular diseases (I60-I69)
- Event of undetermined intent (Y10-Y34)
- Accidental poisoning by and exposure to noxious substances (x40-X49)
- Other forms of heart diseases (I30-I52)

Whereas the 10 leading causes of death for those aged 95+ years are:

- Ischaemic heart diseases (I20-I25)
- Cerebrovascular diseases (I60-I69)
- Organic, including symptomatic, mental disorders (F00-F09)

¹⁷² Australian Bureau of Statistics, *Causes of Death*, Vol 3303.0, 2009 (2011) Table1.3.

- Other forms of heart disease (I30-I52)
- Influenza and Pneumonia (J09-J18)
- Other degenerative diseases of the nervous system (G30-G32)
- Renal failure (N17-N19)
- Hypertensive diseases (I10-I15)
- Chronic lower respiratory diseases (J40-J47)
- Malignant neoplasms of digestive organs (C15-C26)

Mortality rates in both children and young people have significantly declined over the last 20 years, due largely to a significant decrease in deaths arising from transport accidents. Seventy per cent of child deaths occur within the first year of life largely due to perinatal complications or congenital defects.

For those in the 1–14 year age bracket, the leading cause of death was injury and poisonings followed by cancer.

Injury and poisoning accounted for 66.8% of all youth deaths followed by cancer at 9.9%. Land transport accidents accounted for 35% of deaths and intentional self-harm 28% of deaths in this age cohort. Together these accounted for 42% of all deaths among young people in 2007. In both cases the number of males dying from these causes outnumbers females, although the gap between the sexes is decreasing.

Coronary heart disease, cerebrovascular disease (particularly stroke), dementia and Alzheimer's disease, cancers (including lung cancer, colorectal cancer, prostate cancer and breast cancer), chronic obstructive pulmonary disease (including emphysema) were the leading causes of death in those aged 65 years and over in 2007.¹⁷³

Looking at particular age cohorts, the leading causes of death for those aged 65–74 years was coronary heart disease and cancer of the lung. For those aged 75–84 years the leading cause of death was cerebrovascular disease and, for males, cancer of the male genital organs. For those aged 85 years and over the leading causes of death are influenza and pneumonia and kidney failure.¹⁷⁴ Table 11 summarises the leading cause of death for each age cohort.

The information available to me does not provide any evidence of greater risk associated with volunteering in older or younger age brackets. It is clear as I have previously outlined that each selected age range has a different exposure to risk, and no one age group is risk free. Statistics that provide very precise information on causes of death provides a basis on which to make insurance decisions on medical conditions rather than age. Age is, again, not a good proxy for risk of injury or death related to voluntary activity. The existence of particular medical conditions or specific events have the capacity to provide a much more precise basis on which to base insurance policy and importantly it provides a basis for accounting for risk in a way that is not discriminatory on the basis of age.¹⁷⁵

¹⁷³ Australian Institute of Health and Welfare, *Australia's Health 2010* (Canberra, 2010) 326.

¹⁷⁴ Ibid.

¹⁷⁵ Australian Institute of Health and Welfare, *Australia's Health 2010* (Canberra, 2010) 288.

Table 11: Leading causes of death by age and sex, 2006

Age group	Males		Females	
	Cause of death	% deaths*	Cause of death	% deaths*
Infants (less than one year)	Conditions emerging from the perinatal period	49.5	Conditions emerging from the perinatal period	54.8
	Congenital anomalies	23.2	Congenital anomalies	21.3
	Symptoms, signs & ill-defined conditions	10.9	Symptoms, signs & ill-defined conditions	9.9
	Injury and poisoning	3.4	Injury and poisoning	2.1
1–14	Injury and poisoning	45.6	Injury and poisoning	28.6
	Cancer (All neoplasms)	14.2	Cancer (All neoplasms)	21.7
	Nervous system disease	10.0	Congenital anomalies	7.8
	Ill defined	7.1	Ill defined	6.0
15–24	Injury and poisoning	76.5	Injury and poisoning	56.1
	Cancer (All neoplasms)	5.7	Cancer (All neoplasms)	11.8
	Ill defined	4.9	Cardiovascular disease	7.6
	Nervous system diseases	3.9	Nervous system diseases	6.4
25–44	Injury and poisoning	48.9	Cancer (All neoplasms)	35.5
	Cancer (All neoplasms)	15.4	Injury and poisoning	27.5
	Cardiovascular disease	15.2	Cardiovascular disease	11.7
	Ill defined	4.3	Ill defined	5.1
45–64	Cancer (All neoplasms)	41.9	Cancer (All neoplasms)	57.5
	Cardiovascular disease	24.7	Cardiovascular disease	14.4
	Injury and poisoning	10.8	Injury and poisoning	6.2
	Digestive disorders	5.4	Respiratory system diseases	5.0
65–84	Cancer (All neoplasms)	38.3	Cancer (All neoplasms)	33.7
	Cardiovascular disease	31.9	Cardiovascular disease	33.0
	Respiratory system diseases	9.3	Respiratory system diseases	8.6
	Endocrine	4.1	Endocrine	4.7
85+	Cardiovascular disease	42.4	Cardiovascular disease	49.4
	Cancer (All neoplasms)	20.6	Cancer (All neoplasms)	12.3
	Respiratory system diseases	11.6	Respiratory system diseases	8.5
	Mental disorders	5.3	Mental disorders	8.0

* Percent of deaths within each age and sex group.

Source: AIHW National Mortality Database.

IV. ASSESSMENT AND OBSERVATIONS

Chapter 9: Assessment and Observations

The purpose of this investigation is to determine whether the decisions made by insurers to restrict insurance to volunteers in certain age brackets are (1) based on reliable actuarial, statistical or other data; and (2) reasonable having regard to that data and to any other relevant factors.

Section 34(1)(b) of the Tasmanian Act provides that a person may discriminate against another person on the grounds of age in the provision of insurance if the discrimination is reasonable having regard to the data and 'any other relevant factors'.

Section 34(2)(b) requires, however, that the relevant factors on which the discrimination is based apply only if they are disclosed.

The central question is whether discrimination on the basis of age against those who undertake or aspire to undertake voluntary activities is reasonable having regard to the information provided to me by insurance providers and other relevant factors. The onus is on those providing insurance coverage to make the case for the exception through the provision of data and information that supports age as a relevant factor that should be taken into account.

As outlined earlier in this Report, one insurance company, in its submission, provided advice that it intended to remove the age-related discrimination from its policy offer. In the event that this insurer and others adopt this policy approach, I am of the view that they are not acting unlawfully under the Tasmanian Act.

Observation 1: With respect to insurers that do not have or have removed age limits from volunteer personal accident and injury insurance, I am of the view that there is no possible breach of the *Anti-Discrimination Act 1998* (Tas) in the form of age discrimination in the provision of insurance services.¹⁷⁶

With regard to those insurers that have not provided details to me of the data and other factors on which age discrimination within their policies is based, I find that a case has not been made for the exception to apply. Section 34(2) of the Tasmanian Act makes clear that discrimination on the basis of age in the provision of insurance is only permissible if the discrimination is based on actuarial, statistical or other data, the decision is reasonable having regard to the data and other relevant factors and that the data is disclosed when required.

Insurance providers that have not made available this information do not have access to the exception found in section 34 and therefore their exclusion of people from volunteer insurance cover or limiting of such cover on the basis of age would be considered less favourable treatment on the basis of age—unlawful discrimination under the Tasmanian Act—that is not saved by the exception in section 34.

Observation 2: Insurers that have age-based limits on protection under volunteer insurance policies and have not provided evidence in the form of actuarial, statistical or other data on which those limits are based cannot claim that their conduct is protected by the exception found in section 34 of the *Anti-Discrimination Act 1998* (Tas) and, as such, are engaged in activity that meets the legal definition of unlawful discrimination on the basis of age in the provision of services.

Observation 3: With regard to insurers that have age-based limits in volunteer insurance policies and provided evidence to me of the actuarial, statistical or other data on which they base their policy offer, it is my view that the evidence does not support the claim that the exception found in section 34 of the *Anti-Discrimination Act 1998* (Tas) properly applies.

There are three primary grounds on which I have reached my conclusions:

1. The actuarial, statistical and other data provided to me as the basis for excluding volunteers from insurance cover or restricting that cover on the grounds of age is not of sufficient detail or relevance to substantiate the argument that persons within particular age brackets represent an unacceptable risk.

¹⁷⁶ Age discrimination in the provision of insurance services would breach the Tasmanian Act on the basis it would fall within the prohibition against discrimination found in section 14 of the Act on the basis of the protected attribute of age, found in section 16(b) of the Act, in the provision of services, specified as relevant area of activity in section 22(1)(c) of the Act.

2. Having considered the full range of material available to me I am not satisfied that other relevant factors raised by the insurance industry support the case for the application of the exception.
3. The decision to exclude or limit cover available to persons within particular age brackets from volunteer insurance coverage represents a significant barrier to the achievement of broader public policy objectives, including the removal of age barriers to both paid and unpaid work and this is a consideration that is relevant to determining the application or otherwise of the exception.

I examine each of these grounds in more detail below.

Actuarial, statistical and other data

To substantiate their claim that the exception applies, insurance providers are required to prove that there is a proper actuarial basis for the age-related exclusions applying in the policies they sell. Chapter 3 examines how this requirement has been treated by the courts.

Not only must the data be from a reliable source, it must also be sufficient to identify that the person (or group of persons) seeking insurance protection poses an unacceptable risk.

The statistics and other data provided to me by insurers focused on making the case that rates of disability, injury and death are primarily determined by age and that age alone can be considered as a proxy for the risk to insurers of these insured events occurring.

Whilst it is apparent that the data is of high quality and from a reliable source, I am not persuaded that it is of sufficient detail or relevance to substantiate the argument that persons of a particular age represent an unacceptable risk:

- The limited actuarial data made available to me does not provide information of sufficient detail or quality on which to sustain the argument that volunteers in older or younger age brackets pose a higher risk of compensable injury *per se* and, as such, should be excluded from or restricted in insurance coverage.
- Disability is not a sufficient basis on which to exclude volunteers in certain age groups from insurance coverage. People with disability are in many cases able to fully engage in activities across the community and present no greater risk of injury or accident in doing so. People with disability are not a homogenous group and it is not possible to base the exclusion of particular age groups from insurance coverage on assumptions about the likelihood of accident or injury leading to disability or to the capacity of a person with disability to contribute toward the community in a volunteering capacity.
- Underlying the presentation of data provided to me is a view that selected age groups have a greater propensity to accident and injury and therefore an

increased risk of making a personal injury claim in respect of volunteering activity. I have examined information relating to the health status of Australians and note that each age bracket has a different exposure to risk. On the whole, however, Australians of both older and younger age brackets are comparatively healthy and the exposure to risk of the nature covered by the insurance policies covering volunteer workers is likely to be relatively low, particularly where pre-existing conditions are excluded from coverage.

- I do not consider that the data provided to me regarding increased rates of hospitalisation due to injury in older and young age brackets provides the basis for the broad exclusion of particular age groups from volunteer insurance. Rates of hospitalisation due to community injury form approximately 5% of all hospital separations across all age groups and 2.6% of all hospital separations for those in the 65+ age group. In addition, over 70% of falls in the elderly occur in the home or in aged-care facilities. Balanced against the public policy objective of encouraging active lifestyles as a primary means of preventing ill health, I consider that the risk exposure presented by falls does not present a compelling case for the exclusion of people within these age brackets from insurance coverage.
- Figures demonstrating increased incidence of accidental death or death rates in the elderly do not provide convincing evidence of the greater risk associated with volunteers in older and younger age brackets. The level of detail provided by cause of death figures is not sufficient to exclude a broad range of people from insurance coverage on the basis of age. External causes of death represent a relative low proportion of all registered deaths. Transport accidents were the only external cause of death identified in the top 20 causes of death. Falls represented 1% of all deaths. The leading causes of death for those in the very old age brackets relate to matters that are unlikely to be covered under personal injury insurance for volunteers.

In summary, insufficient statistical or actuarial data has been provided to support the claim that younger and older volunteers pose a greater insurance risk in respect of the volunteering activity because of their age. Deteriorating health is not an inevitable consequence of ageing and sufficient variability exists in health status of people within the same age bracket to make age alone a poor indicator of risk. The current approach is based solely on age and not risk, the nature of the activity or the ability to volunteer in a risk-averse or -limiting manner.

Experience, supplemented by limited data, is not a sufficient basis on which to justify discrimination against those volunteers excluded by age.

I am therefore of the view that the case for the exception applying has not been made and that insurers relying on the data provided to me as a basis for excluding volunteers from insurance coverage are engaged in activity that meets the legal definition of unlawful discrimination on the basis of age in the provision of services.

Other relevant factors

Section 34(1)(b) of the Tasmanian Act requires that 'other relevant factors' are taken into account in examining the reasonableness of the decision to discriminate on the basis of age in the provision of insurance services.

I have sought to address this matter from the broadest possible perspective, taking into account information received from both the insurance industry and the broad sector that engages volunteers in its activities.

This approach is supported by case law and by guidance available under related statutes, which requires me to take account the impact on those individuals and organisations excluded from or restricted in coverage; whether it is an approach that is proportionate to the outcome sought by insurers; and the feasibility of alternative approaches.

Several arguments have been put to me by the insurance industry, these include the assertions that:

- lack of coverage does not represent a significant barrier to participation in volunteering activities;
- insurance has become more accessible and that age-related exclusions in general policy documentation is not a complete deterrent to seeking coverage of volunteers in age ranges outside of those stipulated in their product statements;
- the cross-subsidisation of risk resulting from the removal of age-based discrimination would result in higher premiums that may be both uneconomic and unattractive to organisations utilising volunteers; and
- removal of the exception has the capacity to undermine competition within the industry.

At the same time, the volunteer sector argues that restrictions on the availability of insurance coverage is a significant deterrent to involving volunteers in excluded age brackets and that the current approach is at odds with the desire to increase community involvement, particularly of older people; that restriction of benefits on the basis of age is also discriminatory and that the nature of the activity, capacity and risk-management practices should be the focus of decisions regarding insurance, not age.

Details regarding these matters are outlined in Chapter 6 and 7.

I consider all these factors relevant to the decision as to whether or not the case for the exception on the basis of age in the provision of insurance services has been made and should be taken into account in making an assessment of the reasonableness of the discrimination.

On balance I am of the view that the arguments presented by insurance industry participants do not provide a reasonable basis on which to lawfully offer insurance products to cover volunteer workers that discriminate on the basis of age.

Regardless of whether exclusions are contained in the base policy or through an extension of the policy to ages beyond those stipulated within that policy, it is clear that age-based distinctions in both the availability and benefits provided to cover volunteers remain. I do not accept therefore the argument by insurers that universal coverage is generally available.

As I have pointed out earlier in this report, one insurer advised me that it intended to remove age-based distinctions in its policy offering for volunteers, but I have yet to be provided with evidence that this has occurred.

As I have outlined in Chapter 5 of this Report, only two of the organisations that responded to my request for information indicated that they did not have restrictions of any kind in their insurance policies covering volunteers. It is not clear to me whether the unrestricted nature of the coverage they were able to purchase resulted from negotiations with their insurer or was as a result of a standard product offering made available by particular companies.

It is difficult to sustain, therefore, the argument by some sections of the insurance industry that products are readily available and that the most efficient approach to addressing gaps in coverage is to increase the visibility (through improved signposting for example) of those companies that have removed age restrictions.

Further, as noted above, even if such products are available from some insurers that does not excuse other insurers from their obligations to comply with anti-discrimination legislation. In the event that an insurer seeks to exclude cover on the basis of age, it is under an obligation to demonstrate the proper application of the exception in all the circumstances.

Nor is it possible to sustain the argument that lack of coverage has no impact on volunteer numbers. As several submissions attest, the availability of insurance is a factor in determining whether an organisation will continue to involve volunteers in excluded age brackets and in several instances this has resulted in organisations excluding individuals.

I also find the argument for excluding volunteers on the basis of age because there is no need to insure against loss of wages difficult to understand. Firstly, the exclusions found in the policies apply to a broad class of persons and, as such, it is not possible to determine with any certainty that those persons are solely reliant on a pension or superannuation payment as their sole source of income. Nor is it possible to determine with any certainty that a younger person does not engage in any paid employment (and derive an income thereby) in addition to the contribution he or she is making on a voluntary basis. Further, those in the included age brackets may or may not be in paid employment.

In any event, volunteer insurance is not restricted to income protection. Cover generally also provides for a capital or lump-sum benefit arising from death or injury;

or injury assistance benefits, ie, non-medical expenses such as home help, child-minding, travelling, home tutorial assistance and so on.

Without insurance coverage those with an independent source of retirement income may be required to use private savings to offset out-of-pocket expenses. Similarly those in younger age brackets may be reliant on the support of parents or guardians, who themselves may be placed in a difficult financial situation because of the costs associated with an injury.

Further, if a person injured was a person who was not reliant on income, the cost to the insurer of a successful claim would be reduced by the lack of a loss of wages component. This, in effect, supports an argument that the cost of providing the desired cover for those age cohorts less likely to be in paid work may be lower rather than higher.

Nor do I consider sustainable the argument that the removal of age-based distinctions would make volunteer insurance uneconomic or distort the cost-structure of insurance products. Firstly, it should be reiterated that what is required by the Act is that age-based distinctions be removed where they cannot be justified under section 34, not that there should be a uniform offering. (The same response is relevant to the argument that a mandatory requirement to extend coverage would increase premiums. The mandatory requirement under anti-discrimination law is not to discriminate on the basis of age in the provision of insurance unless the insurer can bring its decision to discriminate within the exception provided in section 34 or similar provisions in other anti-discrimination legislation in Australia. This has been a requirement in Tasmania since the Act was promulgated in 1998.)

Insurance by its very nature is based on an assessment of risk and insurers will continue to make commercial decisions regarding whether the products they sell and the premiums charged are sufficiently balanced to meet the costs of the risk profile they have adopted.

The view taken by the insurance industry is that the coverage of older volunteers has the capacity to distort the risk profile of an organisation and make the price of servicing the product increasingly uncertain for insurers. In such a scenario, companies may deliberately inflate prices to account for the unknown impacts, thereby driving up prices to a point where coverage becomes less affordable.

Clearly, however, there are different appetites for risk and different ways in which insurers can account for risk.

Ideally costs spread across an individual's life-time would provide for a more sustainable approach and this view forms the basis for the suggestion that individuals should self-insure for volunteer activities, thereby allowing the pricing of risk to take account of the longevity of the policy and the age at which the individual enters the market. This would result in insurance coverage being negotiated on an individual basis, as is the case, for example, of health insurance. Individuals would carry their own insurance and organisations for which they volunteer would not themselves be required to provide coverage. Whilst this may be the direction that volunteer insurance takes in future, it is not a characteristic of the way in which

insurance coverage is provided at this point in time and it would require a significant shift in responsibility to individuals wishing to volunteer, with the possibility that the pool of volunteers available to community organisations would significantly decrease. At this time, therefore, the likelihood is that group-based insurance covering all volunteers within a particular organisation will continue and must form the basis for my analysis.

Cross-subsidy is inherent in the nature of insurance products. Risks are pooled and averaged not only within particular policy types, but across various policy types.

At the heart of decisions to provide insurance is the requirement that there is a pool of income derived from a diverse range of policy holders that is in excess of the benefits to be paid when insured events occur.

There are a number of ways in which cross-subsidisation works in relation to injury and accident insurance. At any one point in time healthy people cross-subsidise those who are sick or injured and make a claim on the policy. At the same time, the payment of premium contributions over the long term even out the cost of providing services when needed.

At stake is the question whether age alone is the best proxy for risk and whether other options exist for insurers to factor risk into the cost and structure of their policies on a basis other than age.

It is my view that there are alternatives available to the industry to factor in risk on a non-discriminatory basis.

Insurance policies respond to risk in a variety of ways: through the exclusion of pre-existing conditions; exemption from payment where alcohol and drug consumption are linked to an otherwise insurable event; payment limits; restricted benefit periods and so on. Insurers are not restricted to age-based exclusion in and of itself as the only option to manage risk. They can, and very often do, use other conditions such as the exclusion of pre-existing conditions, requiring implementation of effective risk-management and risk-minimisation strategies, excluding or limiting cover for particularly risky activities or increasing the premium for those activities, or variations in benefits to manage their potential exposure to high-risk categories.

Since medical risk represents a significant exposure for insurers and is the primary reason for excluding some volunteers from coverage, exposure to risk may be managed by placing limits on the medical risk covered. So, for example, insurers could exclude or cap payments in relation to a particular injury or death resulting from falls or limit benefits payable for this form of injury.

This approach is not uncommon in the policies examined. One insurer, for example, excluded any type of hernia suffered by a volunteer, however caused. Others regularly excluded any pre-existing condition or degenerative condition unless explicitly accepted by the insurer.

Importantly, these approaches do not rely on age discrimination as the basis for minimising exposure to risk.

At the same time, the commercial soundness of decisions that exclude a large and growing market segment is questioned. Older people represent a large and, in commercial terms, increasingly important group in the population, and the non-government sector is of the view that the increased involvement of this group in community activities is opening up new opportunities within the insurance market.

As outlined in Chapter 2, in excess of 880,000 people over 65 years of age volunteered in 2010, including more than 30,000 individuals over 85 years of age. In Tasmania, this included over 27,000 volunteers over 65 years of age, the majority contributing to organisations in rural and regional areas.¹⁷⁷

Balanced against the impact on voluntary organisations and those that are excluded on the basis of age, and in the absence of data showing a clear correlation with risk, I am of the view that age-based exclusions as a primary mechanism for responding to the exposure to risk cannot be sustained.

Impact on public policy objectives

The use of age as the basis for exclusion from coverage is having a significant impact on community organisations and these difficulties are likely to increase as our population ages.

At the same time, the maintenance of an age-based exception for the insurance industry has other unintended consequences and is at odds with changing community objectives, in particular the desire to promote an active role for all people within our community, particularly older people.

So whilst efforts are being made to remove barriers to involvement in paid work for older Australians, maintenance of an age-based exception for insurers in a way that has the effect of discouraging continued involvement in unpaid work must also be carefully examined.

Factors affecting age discrimination do not occur in isolation from changes in the rest of society. At a policy level, governments have identified the need to retain people in the workforce as a national priority. At the same time there are compelling human rights arguments for ensuring that everyone has access to productive employment, whether paid or unpaid.

Significant debate is currently underway about the barriers to employment for mature-age workers. Increasingly age discrimination in employment is being challenged and all policy levers acting as both an incentive and disincentive to participation are subject to greater scrutiny. This includes workers' compensation, insurance, superannuation and other legislative and regulatory requirements.

¹⁷⁷ ABS, *Voluntary Work Australia 2010*, cat no. 4441.0 (2011) Table 4.

At the same time the distinction between paid and unpaid work is also beginning to blur, leading to questions about the legitimacy of treating age differently in relation to voluntary as opposed to paid work.

I believe that it is appropriate that these changes in government objectives be reflected in the approach taken to the age-discrimination provisions and exceptions in the Tasmanian Act.

As awareness grows of barriers to equality based on age, so too does the desire to ensure that retained barriers are reasonable and proportionate. It is not appropriate to argue that age barriers should be maintained because that this is the way we have always worked. By enacting age discrimination legislation in this and other jurisdictions, governments have made clear that age discrimination is not acceptable and that conduct inconsistent with those laws must only occur only where clearly justified.

It is my view that in relation to the provision of insurance for volunteers this is not currently the case and that the reliance on an exception to discrimination law in its current form is not justified.

Summary of Observations:

Observation 1: With respect to insurers that do not have or have removed age limits from volunteer personal accident and injury insurance, I am of the view that there is no possible breach of the *Anti-Discrimination Act 1998* (Tas) in the form of age discrimination in the provision of insurance services.¹⁷⁸

Observation 2: Insurers that have age-based limits on protection under volunteer insurance policies and have not provided evidence in the form of actuarial, statistical or other data on which those limits are based cannot claim that their conduct is protected by the exception found in section 34 of the *Anti-Discrimination Act 1998* (Tas) and, as such, are engaged in activity that meets the legal definition of unlawful discrimination on the basis of age in the provision of services.

Observation 3: With regard to insurers that have age-based limits in volunteer insurance policies and provided evidence to me of the actuarial, statistical or other data on which they base their policy offer, it is my view that the evidence does not support the claim that the exception found in section 34 of the *Anti-Discrimination Act 1998* (Tas) properly applies.

There are three primary grounds on which I have reached this conclusion:

1. The actuarial, statistical and other data provided to me as the basis for excluding volunteers from insurance cover or restricting that cover on the

¹⁷⁸ Age discrimination in the provision of insurance services would breach the Tasmanian Act on the basis it would fall within the prohibition against discrimination found in section 14 of the Act on the basis of the protected attribute of age, found in section 16(b) of the Act, in the provision of services, specified as relevant area of activity in section 22(1)(c) of the Act.

ground of age is not of sufficient detail or relevance to substantiate the argument that persons within particular age brackets represent an unacceptable risk.

2. Having considered the full range of material available to me I am not satisfied that other relevant factors raised by the insurance industry support the case for the application of the exception.
3. The decision to exclude or limit cover available to persons within particular age brackets from volunteer insurance coverage represents a significant barrier to the achievement of broader public policy objectives, including the removal of age barriers to both paid and unpaid work and this is a consideration that is relevant to determining the application or otherwise of the exception.

Chapter 10: Future directions

The practice of including in anti-discrimination legislation exceptions for insurance providers from the legal obligation not to engage in unlawful discrimination relies on the voluntary adoption of measures by insurers to ensure that their decisions are made in accordance with the terms of the exception and are least discriminatory in their impact. It is my view that the voluntary approach has not worked in relation to the provision of insurance services to volunteers.

Decisions to exclude volunteers within certain age brackets or to provide coverage on the basis of increased premiums and/or reduced benefits, is taking place without the evidentiary basis required by the Tasmanian Act. This is unacceptable and I believe it is necessary to explore options to restore the balance intended at the time the exception was enacted.

As the insurance industry is largely structured and regulated on a national basis, I believe that it is important to consider matters raised by this investigation at a national level and to identify options that would be sustainable across the industry.

The following sets out options and recommendations in relation to future directions on this matter.

Removal of age-based limitations

As the information made available to me does not establish the proper application of the exception to the current practice of many insurers, it is my view that it is appropriate to seek the removal of remaining age-based limits on volunteer insurance products offered to organisations.

Recommendation 1: That those insurance providers that have age-based limits in volunteer insurance policies amend their policies to remove those limits unless and until they are able to produce evidence that demonstrates that such limits are justified by risk in accordance with the exception contained in section 34 of the *Anti-Discrimination Act 1998* (Tas).

In making this recommendation, I am mindful of views expressed by the Insurance Council of Australia that requiring uniform policy offerings for volunteer insurance has the potential to distort competition. However I do not believe there is sufficient evidence to suggest that the market itself can be relied upon to generate solutions over time. Nor does the removal of age-based limits remove the opportunity from insurers to develop differentiated product offerings or to structure their products according to other non-age-related criteria.

Nevertheless, I accept that the removal of age exclusions may result in insurance providers increasing premiums as a way of dealing with what they consider to be

uncertain risk they may be required to carry. This would provide some financial protection for those insurers that currently exclude coverage on the basis of age from getting the risk assessment wrong. However, it may also lead to the price of premiums becoming prohibitive to organisations seeking cover. This in turn may impact on the willingness of organisations to take out personal injury insurance for volunteers.

Charging fully risk-reflective pricing is seen by some within the insurance industry as difficult because the requirement to purchase coverage for volunteers is optional and organisations may take the decision to forgo coverage if costs become prohibitive.

At the same time, I am aware that some national seniors' organisations have expressed concern about increased health and safety obligations on volunteers arising from national health and safety reforms.

For this reason, I believe it is necessary to examine options that would provide access to insurance cover for volunteers on a non-discriminatory basis in a way that is within the general appetite of the insurance industry and consistent with outcomes sought by volunteers themselves and the organisations with which they volunteer.

Whilst it is not appropriate to provide a definitive approach to the way in which age-related discrimination in insurance products for volunteers is removed, I note that national discussion has commenced regarding the removal of age-based restrictions in a range of areas related to workplace injury. Coupled with a drive for consistency in the way in which an employee is defined, for example, changes to workers' compensation arrangements may in future cover a greater number of volunteers. Appropriately structured access to workers' compensation for volunteers, taking into account the voluntary nature of the duties they perform, would improve the alignment between paid and unpaid employment.

Whilst such approaches may address concerns in the longer term, I am of the view that there is a need to consider regulatory approaches to address discrimination in the provision of insurance to volunteers in the short term.

The Insurance Reform Advisory Group (IRAG) was established in 2011 as a forum to enable Government, the insurance industry and key stakeholders to come together to address insurance issues. Of particular interest to IRAG are the insurance needs of older Australians. It is recommended that the matters raised by this report be referred to IRAG in the first instance, with a view to IRAG assessing the report as part of its work to more broadly address issues related to age and insurance.

It is my view that this and related matters would benefit from being addressed by the development of an Insurance Industry Anti-discrimination Code of Compliance.

A code of compliance has the capacity to provide a mechanism to enable conduct to be identified that would not be unlawful conduct for the purposes of the Tasmanian Act or under other anti-discrimination statutes that contain similar provisions.

At a minimum the Code should identify mechanisms to achieve compliance with least discriminatory practices, including timeframes for the phase out of remaining age-based discrimination in the provision of volunteer insurance.

Development of a certified compliance code would provide greater incentive for insurers to meet their obligations in relation to anti-discrimination law and provide certainty to industry regarding the way in which the exception is to be applied.

Recommendation 2: That the Insurance Reform Advisory Group be requested to oversee the development of an Insurance Industry Anti-discrimination Compliance Code, containing both compliance and enforcement mechanisms aimed at providing clarification of the way in which insurance exceptions in anti-discrimination law are to apply, including in respect of volunteer insurance coverage.

Recommendation 3: That the Insurance Industry Anti-discrimination Compliance Code include binding timeframes for the removal of remaining unjustifiable age discrimination in the provision of accident and injury insurance for volunteers.

Recommendation 4: That the Insurance Industry Anti-discrimination Compliance Code be the subject of consultation with stakeholders representing the insurance industry; age and volunteering organisations; and with members of the Australian Council of Human Rights Agencies (ACHRA), being the Commonwealth, state and territory statutory anti-discrimination authorities.

Recommendation 5: That, subject to the passage of consolidated human rights and anti-discrimination law at the Commonwealth level and agreement by the members of ACHRA, the Australian Human Rights Commission be requested to certify the Insurance Industry Anti-discrimination Code for application across the insurance sector. In the absence of that consolidation, it is recommended that IRAG work with ACHRA to identify alternative mechanisms to implement the Insurance Industry Compliance Code.

Increased transparency and enhanced reporting

I am also of the view that insurance companies should be required to make more widely available meaningful reasons when decisions to exclude certain categories of people are made. Explanations for unfavourable underwriting decisions would create greater transparency and provide avenues for decisions to be contested where appropriate.

Accordingly, I have recommended that amendments be introduced to section 34 of the Tasmanian Act to provide that a condition of meeting the exception includes an express requirement that insurers provide reasonable access to the data on which exception to the Act is sought if requested to do so by affected parties and/or the Anti-Discrimination Commissioner.

At the same time, I consider it appropriate that steps should be taken by the industry to ensure that insurers are more active in providing information to those seeking insurance where a decision is taken to restrict the contract on the basis of age.

The Insurance Council of Australia have advised that section 75 of the *Insurance Contracts Act 1984* (Cth) requires insurers to provide upon request reasons for refusal of insurance. It is a penalty offence under that Act not to do so.

Section 75(1) of the Act sets out the following:

- (1) Where an insurer:
 - (a) does not accept an offer to enter into a contract of insurance;
 - (b) cancels a contract of insurance;
 - (c) indicates to the insured that the insurer does not propose to renew the insurance cover provided under a contract of insurance; or
 - (d) by reason of some special risk relating to the insured or to the subject-matter of the contract, offers insurance cover to the insured on terms that are less advantageous to the insured than the terms that the insurer would otherwise offer;

the insurer shall, if the insured so requests in writing given to the insurer, give to the insured a statement in writing setting out the insurer's reasons for not accepting the offer, for cancelling the contract, for not renewing the insurance cover or for offering insurance cover on less advantageous terms, as the case may be.

At the same time, Standard 2.1.5 of the General Insurance Code of Practice provides that if an insurer cannot offer insurance it will provide reasons; refer to another insurer or the Insurance Council of Australia or the National Insurance Brokers Association; and make available information about complaint-handling processes if the consumer is unhappy with the decision.

The application of this standard to the buying and renewal of insurance in situations where the decision is reliant on using the exception available to it under anti-discrimination law would ensure that the basis on which decisions are made are more transparent and contestable. Accordingly, I recommend that the insurance industry give more consideration to how the provisions in the Code can be applied to decisions made in relation to the provision of volunteer insurance that would be unlawfully discriminatory but for the exception provided in section 34 of the Tasmanian Act.

As I have outlined elsewhere in this report, the provision of regular updates to APRA on performance is integral to monitoring industry practice. As discrimination on the basis of age continues to be strongly contested, I consider that insurers should also be required to submit as part of its regular reporting a list of products where age continues to be a factor used to exclude coverage or determine premiums and benefits and the data on which these decisions rely.

Reporting of this nature is becoming increasingly common. I note, for example, that from 30 June 2012 the Association of British Insurers is required to publish aggregated industry data that is relevant to the use of age in the assessment of risk in certain classes of insurance.¹⁷⁹ Information for the publication is sourced from a range of companies.¹⁸⁰

Publication of data will allow for more informed public debate about discriminatory provisions in insurance products and provide a basis on which decisions made by insurers can be tested.

Recommendation 6: That section 34(2) of the *Anti-Discrimination Act 1998* (Tas) be amended to provide that a condition of having protection from liability by reason of the exception include that insurers provide reasonable access to the data on which exception to the Act is sought if requested to do so by affected parties and/or the Anti-Discrimination Commissioner.

Recommendation 7: That insurers that are unwilling to provide coverage for volunteers in particular age groups, or that provide (or propose to provide) differential benefits on the basis of age or coverage at a different premium, be required as a matter of course to provide reasons and to refer those seeking insurance to another insurer able to provide coverage or to the Insurance Council of Australia or the National Insurance Brokers Association as provided for under Standard 2.1.5(b) of the General Insurance Code of Practice.

Recommendation 8: That insurers be required to submit for open publication, a list of products where age is a factor used to exclude coverage or determine premiums and benefits and the data on which these decisions rely.

Guidelines

The preparation of guidelines for insurers would also assist in ensuring that the way in which any exceptions are applied is consistent, transparent and justified.

The Australian Human Rights Commission's guidelines on how insurance and superannuation exception provisions apply in relation to the *Disability Discrimination Act 1992* (Cth) provide guidance on these matters and could be extended to provide guidance where other exceptions, such as in relation to age, exist.

Such information should include guidance on how the exception should apply, the nature of actuarial, statistical and other data required to substantiate a claim for exception; and examples of how insurers can ensure it is operating consistent with the exception in a way that is least discriminatory, including ways that do not involve

¹⁷⁹ See Association of British Insurers, *Data by Gender and Age*, available at <http://www.abi.org.uk/Facts_and_Figures/Data_by_Age_and_Gender.aspx> (downloaded 6 September 2012).

¹⁸⁰ Association of British Insurers, *Age and insurance: helping customers understand insurers' use of age in motor and travel insurance* (June 2012) 11.

the use of age as a basis for assessing underwriting risks in the provision of insurance coverage for volunteers.

At present there appears to be a view within the insurance industry that the exception provided under the Tasmanian Act applies as a matter of course and does not require evidence to show it is available in the circumstances. This is not the case. The onus of proof rests with insurers and in situations where that proof is not available the exception does not apply. As this is a matter that has attracted interest at a national level, I am of the view that national guidelines are required to address this and related matters. As a consequence I have recommended that national guidelines be developed to clarify the basis on which exceptions for insurance services are to operate.

Recommendations 9: Noting the work already done by the Australian Human Rights Commission on insurance guidelines in respect of disability, that the Australian Human Rights Commission develop national guidelines, in consultation with other members of ACHRA, on the way in which exceptions for insurance provision in anti-discrimination law more broadly are to operate. Such guidelines should include information on how any exception should apply, the nature of the actuarial, statistical or other data required to substantiate a claim for exception and examples of how insurers can meet the terms of the exception in the least discriminatory manner.

Enhanced obligations on volunteer organisations

Voluntary organisations vary in the size and scale of their activities and in their financial turnover. Nevertheless all organisations, whether large or small, incorporated or unincorporated, assume responsibility for the protection of people involved in their activities from foreseeable harm. In the case of incorporated bodies legal responsibility in the event of death or injury will generally reside with the organisation. Where negligence results in injury to a person working within an unincorporated body, individual members or office holders may be held personally liable.

The decisions about whether and what type of insurance coverage is purchased to protect volunteers are not made by the volunteers themselves, but by the organisation.

Where volunteers injured in the workplace do not have access to workers' compensation, insurance cover is all that is available to avoid the potential of liability resting with the organisation or its office bearers.

As discussed elsewhere in this report, as employers, community organisations have responsibility to minimise risk by establishing policies and strategies to reduce or eliminate exposure to harm.

It is my view that there is a need for some reframing of the policy debate around this matter to ensure that organisations are aware of their responsibilities to volunteers, including under anti-discrimination law.

It cannot readily be said that organisations that utilise volunteers and exclude volunteers on the basis of age could validly have some protection under anti-discrimination legislation because of the lack of availability of insurance offerings for volunteer insurance for all age-brackets and limited financial capacity to bear the risk of a compensable injury occurring. There is no exception in the Tasmanian Act in respect of employment discrimination on the basis of age that readily applies to this circumstance. If the alleged discrimination were to be framed as indirect discrimination on the basis that an organisation will only engage those people as volunteers who are eligible for volunteer insurance coverage, it may, however, be arguable that the age discriminatory effect of this condition is reasonable in the circumstances if the organisation could demonstrate that it (a) had sought to obtain such cover and either could not do so or could only do so at prohibitive cost **and** (b) did not have the financial capacity to bear the risk of a compensable injury occurring.

A requirement that all employees (including volunteers) are covered under an organisation's insurance arrangements would encourage voluntary organisations to exercise a more uniform approach to seeking insurance coverage for older volunteers.

At present there appears to be little or no incentive on community organisations to ensure that all volunteers are covered for accident or injury to their volunteer workforce. This is particularly true for organisations that do not understand the nature of the risk they bear under anti-discrimination law and/or in respect of liability for a compensable injury.

In a situation where the market is failing to address these gaps, it is important for action to be taken to improve outcomes for those groups that may be excluded on the basis of age.

Increased awareness of the liability of those responsible for the oversight of volunteers will reduce the costs to government in situations where uninsured harm occurs.

At the end of the day accidents can and do happen. What emerges as the underlying issue is who should bear the responsibility for the costs when accidents occur. Insurance pools risks in a way that the costs associated with harm are shared among policy holders. For that pool to be inclusive of all volunteers requires the creation of incentives at both the organisation and insurer level.

The rationale behind mandatory coverage for some insurance products is public safety. Where coverage is voluntary this is largely because the benefits are perceived to accrue to the individual. But this perception is changing. Awareness is increasing about the savings that are being made by ensuring that organisations providing or involved in a range of valued and valuable community services continue to attract and retain volunteers. At the same time, volunteers who, through remaining active, are healthy and engaged have lower calls on public health funds.

Improving volunteer coverage and removing age discrimination in the provision of insurance could be traded in exchange for increased capital pool. This should assist in removing or eliminating gaps in coverage.

Formalising the requirement for insurance coverage, in relation to incorporated entities at a minimum, would also act as an incentive for community organisations to effectively prevent, manage and reduce risk, thereby helping to reduce the number and severity of claims.

This may mean actively monitoring the health, wellbeing and skill of volunteers and introducing guidelines to assess the risk profiles and inherent requirements of particular volunteering activities and to assess particular capacity and ensure that the work volunteers are allocated is appropriate to that capacity.

Over time it would also enable claims data to be analysed to provide information on the pattern of claims in relation to age brackets currently uninsured and provide the basis on which insurers could better assess the claims patterns of individual organisations. This will improve data collection and provide a better basis on which to make sound judgments about parameters for safe volunteering as it relates to age.

Mechanisms for moving community organisations beyond seeing volunteer insurance as voluntary inevitably come down to a question of judgement and one that is beyond the remit of this investigation.

Volunteering Australia has, for example, been exploring the idea of portable individual personal accident and liability insurance to ensure that volunteers are covered under all circumstances.¹⁸¹ This would benefit those who are unsure whether the organisation with which they volunteer has insurance coverage and potentially the problem of voluntary organisations not insuring perceived high-risk groups because of cost. It would also shift the emphasis to individual assessments and specific identification of risk. However this approach is likely to have a significant impact on volunteer numbers.

Another option would be to make it mandatory for community organisations to provide to new volunteers a statement outlining the exact insurance coverage they have, including any age-based exclusions or restriction of benefits. This could form part of a written contract provided to the volunteer outlining the rights, duties and obligations of all parties.

Recommendation 10: That the Australian Charities and Not-for-profits Commission implement strategies to increase awareness among charities and not-for-profit organisations about duties and obligations to volunteers, including legal liability for injury compensation in the event that insurance coverage for volunteers is not obtained or is restricted.

Recommendation 11: That options be explored at the State level by Volunteering Tasmania and other bodies working with organisations that use volunteers with

¹⁸¹ Volunteering Australia, *Issues related to insurance protection for volunteers* (Issues paper, April 2010) 10.

support from the State Government to seek the provision of universal personal accident and injury coverage for all Tasmanian volunteers not covered under the Tasmanian Risk Management Fund, including volunteers in age brackets that are currently excluded from coverage, through a bulk purchase agreement brokered with the assistance of the Tasmanian State Government.

Recommendation 12: That peak bodies for organisations in Tasmania that use volunteers develop strategies to encourage member organisations to make available to all volunteers a statement of their rights, duties and obligations, including the terms of any insurance coverage.

Recommendation 13: That not-for-profit peak bodies work together to support the development of information resources for members about insurance products, the benefit of advocating to potential insurance providers and brokers about insurance cover required for volunteers, including the age of volunteers and the potential benefits of shopping around to ensure the cover needed is obtained.

Simplified policy statements

In many cases insurance coverage and, in particular, the limitations placed on the age of volunteers, are poorly understood by both organisations and insurers and there is often a lack of awareness about the level of insurance cover held.

The difference between the insurance policy statement and schedules is confusing. Organisations sometimes believe, for example, that all volunteers are covered under their existing policy as the age-based exclusion is documented in the policy document proper and not in the schedules of insurance provided to them.

Nor is there a strong understanding of the limitations of the coverage provided and how it relates to liability.

For these reasons, I also encourage action to explore ways in which the drafting of policy documents is improved to ensure clarity of meaning and understanding and the limits of the coverage are more clearly explained to organisations.

Recommendation 14: That further work be done by key stakeholders nationally to encourage the simplification of insurance policy documents to provide a clearer explanation of the insurance coverage purchased by organisations.

CONTACT US

If you have any questions about the content of this report or would like to receive this document in an alternate format, please contact the Office of the Anti-Discrimination Commissioner, Tasmania:

Telephone:

1300 305 062 (Local call) or (03) 6233 4841 (Office)

Facsimile:

(03) 6233 5333

Web:

SMS 0409 401 083

Location:

Level 1, 54 Victoria Street Hobart, Tasmania 7000

Postal:

GPO Box 197 Hobart, Tasmania 7001

E-mail:

antidiscrimination@justice.tas.gov.au

Website:

www.antidiscrimination.tas.gov.au

Translating and Interpreting Services (TIS)

24-Hour Service

Telephone: 131 450

National Relay Service

If you are deaf, or have a hearing impairment or speech impairment, you can contact the OADC through the National Relay Service

www.relayservice.com.au

TTY users phone 133 677 then ask for 1300 305 062

Speak and Listen users phone 1300 555 727 then ask for 1300 305 062

CELEBRATING DIFFERENCE – EMBRACING EQUALITY

