



Office of the Anti-Discrimination Commissioner  
*Celebrating Difference, Embracing Equality*

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**REPORT OF THE ANTI-DISCRIMINATION  
COMMISSIONER TO THE HON. DAVID  
LLEWELLYN MHA, MINISTER FOR JUSTICE  
AND ATTORNEY-GENERAL, MADE UNDER  
SECTION 6(a) OF THE *ANTI-DISCRIMINATION  
ACT 1998*:**

***"ANNUAL DRIVING TESTS FOR DRIVERS AGED  
85 YEARS AND OVER"***

**FEBRUARY 2008**

Under s6(a) of the *Anti-Discrimination Act* 1998 ("the Act"), one of my functions as Commissioner is to advise and make recommendations to the Minister on matters relating to discrimination and prohibited conduct.

I provide this report in accordance with s6(a) of the Act.

### **Annual driving test for those aged 85 years and over:**

On 16 August 2007, the Office of the Anti-Discrimination Commissioner ("the OADC") received a request to take action regarding a regulation requiring drivers aged 85 years and over to undertake an annual driving test. It was noted in the letter that drivers in this age group are already required to have an annual medical check (from 75 years of age).

On 3 September 2007, the OADC received a letter from a different member of the public raising concerns about the Department of Infrastructure, Energy and Resources (DIER) requiring a driving test for all drivers 85 years or over. That letter asserted that the Department has no statistical basis in accident data for such a demand.

Both letters raised concerns about age discrimination in relation to annual driving tests for those aged 85 years and over. Neither person concerned wished to make a complaint of discrimination, but wanted their concerns to be addressed.

### **Method of Inquiry:**

The following documents were considered:

- Letter received from "W" on 16 August 2007, dated 14 July 2007
- Letter received from "I" on 3 September 2007, dated 30 August 2007, with attached letters from the Ombudsman to "I", dated 23 July 2007, and from the Registrar of Motor Vehicles to the Ombudsman, dated 20 July 2007
- DIER 'Licences – Senior Drivers Guidelines' accessed on the DIER website<sup>1</sup>
- *Vehicle and Traffic Act* 1999
- *Vehicle and Traffic (Drivers Licensing and Registration) Regulations* 2000
- Letter received from the Registrar of Motor Vehicles, dated 7 November 2007
- Linda Smith, 'RACT calls for driver test update,' *The Mercury*, 23 July 2007<sup>2</sup>
- Letter received from the Registrar of Motor Vehicles, dated 11 January 2008
- RTA, 'Licensing of older driver Discussion paper,' July 2007<sup>3</sup>

The DIER 'Licences – Senior Drivers Guidelines' provides the following:

- Drivers aged 75 to 84 are required to have an annual medical examination.
- The medical examination includes the doctor filling out a medical questionnaire sent to the driver by DIER.

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<sup>1</sup> Accessed at: [http://www.transport.tas.gov.au/licence\\_information\\_folder/licenses\\_-\\_senior\\_drivers\\_guidleines](http://www.transport.tas.gov.au/licence_information_folder/licenses_-_senior_drivers_guidleines).

<sup>2</sup> Accessed at <http://www.news.com.au/mercury/story/0,22884,22118041-3462,00.html> on 21 August 2007.

<sup>3</sup> Accessed at <http://www.rta.nsw.gov.au/licensing/olderdriverdiscussionpaper.html>.

- Drivers aged 85 and over are required to have a medical examination every year and have a driving test every year.

On 3 September 2007, I wrote to the Registrar of Motor Vehicles ("the Registrar"), advising that concerns had been raised regarding annual driving tests for those aged 85 years and over. The following questions were put to the Registrar:

1. Is the requirement that a person aged 85 years or older submit to an annual driving test to retain his or her licence mandated under legislation or is it merely the practice to utilise section 56 of the Vehicle and Traffic Act in all cases of persons over the age of 85? Please provide details, including relevant sections of legislation (including Regulations) if applicable.
2. What is the rationale for imposing differing requirements on those aged 85 years old and over? Please provide details.
3. Is a person's licence suspended prior to taking the test and returned only in the event of a successful test? Please provide details.
4. If so, is this mandated under legislation? Please provide details, including relevant sections of legislation (including Regulations) if applicable.

By letter dated 7 November 2007, the Registrar provided the following information in response to the above questions:

1. Annual mandatory driving testing of drivers aged 85 and over is not specified in legislation. The driving test is a business rule to support the requirements of the Registrar under s56(1)(a) and (b) of the *Vehicle and Traffic Act 1999*.
2. There is evidence that older driver safety is closely related to age. However, DIER is not able to point to any specific evidence that supports mandatory aged-based driver testing at 85 years and over. DIER considers that some method for assessing fitness to drive amongst older drivers is required, as crash patterns for older drivers show that their driving skills deteriorate with age, particularly in relation to inattention, giving way and intersections.

DIER is closely monitoring the trial of a new system for older driver licensing in Western Australia, piloting a model developed by Austroads that specifically targets "at risk" older drivers. A report by Austroads is due shortly. DIER will consider the findings of the trial and review the current licensing system in Tasmania, subject to other competing priorities for resources.

In the meantime, a key advantage of the current system is that in addition to the assessment of driving skills, the annual driving test provides an opportunity for older drivers to self-assess their driving needs on a regular basis. There are instances where notification of the requirement to undertake the test has resulted in the voluntary surrender of the licence. Following the test, some older drivers may be able to continue driving, but in restricted circumstances. For example, limiting the licence holder to driving within a certain radius from the driver's home or during daylight hours.

It is expected that road safety issues for the new generation of older drivers will increase in the future as a result of the growth in the aged population and

the number of older drivers with licences who will be dependent on driving to access facilities and services. The challenge for licensing authorities will be how to maintain the mobility of older drivers without impacting on road safety.

3. Automatic licence suspension does not occur prior to taking the test. It would be unusual for an older person's driver's licence to be suspended or cancelled prior to an annual driving test. An exception might be if the Registrar has information from an appropriately qualified person, e.g. a police officer or doctor, in support of immediate suspension prior to testing.

An older person's licence may also be suspended if they have failed to undertake the requested medical or driving test within timeframes set by the Registrar or, in some circumstances, when they have failed a driving test. In most cases, any retesting is undertaken within a short timeframe.

If a licence is suspended, the suspension remains in place until the requested action has been undertaken to the Registrar's satisfaction, e.g. a successful medical or driving test.

The power for the Registrar to suspend a driver's licence, either prior to or after a driving test, is contained under Regulation 25 of the *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000*. In these situations, where an administrative decision is made to suspend or cancel a licence, the person has appeal rights.

*The Mercury* article 'RACT calls for driver test update' cites RACT chief engineer Doug Ling as saying the current system, which requires drivers who turn 75 to undertake annual medical tests and drivers aged 85 and over to sit an additional yearly driving test, is ageist and ineffective, and calling for it to be scrapped in favour of a one-on-one assessment referral process. Mr Ling is further reported to have said:

- A number of studies interstate suggested that the current system was not lowering the number of crashes involving older people.
- States with licence restrictions had just as many crashes as states without restrictions.
- The current system did not take into account that many younger drivers could have their driving impaired by vision, mobility and other problems.
- Mr Ling would like to see fewer mandatory restrictions and more volunteer reporting of health problems, to create a better mindset among elderly drivers.
- Under Mr Ling's proposed measure, all drivers and their families would be encouraged to monitor their own health more closely, and would be encouraged to report any concerns.
- Under the plan doctors and optometrists would be legally required to report patients who have problems that could impair their driving – regardless of their age.

On 11 December 2007, I again wrote to the Registrar, enclosing the article. The following questions were put to the Registrar:

1. What are the features of the new system for older driver licensing currently being trialled in Western Australia?

2. Does that system have similar features to the model proposed by Mr Ling?
3. What is DIER's view regarding the proposal put forward by Mr Ling?

By letter dated 11 January 2008, the Registrar provided the following information in response to the above questions:

1. The new system being trialled is an alternative to the age-based on-road testing. It aims to identify those older drivers who demonstrate some preliminary evidence of being at risk, to use screening within the community, and a referral-based model for driver testing.

The system requires medical practitioners and other health professionals to use a screening tool to identify "at risk" drivers. It also relies on the wider community, such as police, care organisations, insurance companies and the driver's family members, to provide information about the ability of a driver to control a motor vehicle for their own safety.

When an "at risk" driver is identified, the relevant licensing authority is notified, which in turn uses an "off-road assessment tool" to identify whether that person is a safe driver. Depending on the result, the driver may continue driving, be referred to a specialist, be required to undertake a driving test, or have their licence suspended or cancelled.

A key element of the new system is the provision of support to the driver by way of a Case Officer.

2. The new system for older driver licensing is similar to the model proposed by Mr Ling, insofar as they both involve a one-on-one assessment process and drivers and the community notifying licensing authorities.

Both Mr Ling's proposal and the system exclude "local area" restrictions as proposed by New South Wales. This was not included in the scope of the work because, unlike Tasmania, they are not available in Western Australia. To include them as part of the scope would have a significant impact on Western Australian Departmental testing officer resources as well as other implementation issues. The system developers also believe that even if an older driver drove a short distance they remain a road safety risk both in terms of their driving ability and their ability to identify, assess and take evasive action to avoid a crash.

Mr Ling's proposal to mandate doctors and optometrists to report patients is not a part of the system being trialled.

3. DIER is supportive of parts of Mr Ling's proposal that are within the new system for older driver licensing and is actively awaiting the outcomes of the trial – expected mid-2008.

DIER encourages drivers and the community to monitor other drivers' driving and medical conditions. It receives a large number of notifications from both

drivers and the community advising that a driver is, or may be, unsuitable to hold a driver's licence. Each notification is actively managed. In addition, a large number of notifications are received through medical practitioners and other allied health professionals. DIER actively supports this approach and has recently provided presentations to medical practitioners about the licensing and notification process. These presentations will continue in 2008.

A this time DIER is unaware of any evidence indicating that States with licence restrictions have as many crashes as those states without restrictions. New South Wales issued a Discussion Paper in July 2007 proposing to mandate licence restrictions for all older drivers aged 85 or older. DIER currently only issues licence restrictions when an older driver has a medical condition which in the medical practitioner's opinion should be subject to a restriction, or the older driver requests it (normally this follows the failing of an on-road driving test).

DIER opposes the introduction of mandatory notification by medical practitioners unless this provision has the full support of medical practitioners and their representative bodies. The issue of mandatory reporting was discussed and opposed by the medical profession during the Austroads/National Transport Commission project to develop the 2003 national medical standards for licensing and clinical management guidelines for commercial and private vehicle drivers. DIER believes there is currently a reasonable level of notification by health care professionals both with and without their patient's knowledge.

### **Discussion:**

Under the Act, direct discrimination is defined in s14(2) as when a person treats another person on the basis of any prescribed attribute less favourably than a person without that attribute. Under s16(b) of the Act, age is a prescribed attribute.

DIER has confirmed that an annual driving test for drivers aged 85 and over is a "business rule" to support the requirements of the Registrar under s56(1)(a) and (b) of the *Vehicle and Traffic Act 1999*.

Section 56 of the *Vehicle and Traffic Act* states that:

#### **56. Tests and examinations of drivers**

(1) The Registrar may require a person who is authorised or entitled to drive motor vehicles of a particular class in Tasmania under a driver licence, ancillary certificate or exemption to undergo a test or assessment, or provide other evidence to the Registrar's satisfaction, that the person –

- (a) is competent to drive motor vehicles of the relevant class and is a suitable person to drive such vehicles; and
- (b) has adequate knowledge of safe driving practices and adequate skill in their application; and
- (c) in the case of the holder of an ancillary certificate in driving instruction – is a suitable person to provide instruction in the driving of motor vehicles of the relevant class.

(2) The Registrar may require a person who is authorised or entitled to drive motor vehicles of a particular class in Tasmania under a licence, ancillary certificate or exemption to submit to a medical examination (at the person's own expense) by a medical practitioner or a registered health care practitioner, or to produce other evidence to the Registrar's satisfaction, that the person complies with relevant standards of physical and mental fitness to drive motor vehicles of the relevant class.

(3) The Registrar may require a person who is authorised or entitled to drive motor vehicles of a particular class in Tasmania under a licence, ancillary certificate or exemption to submit to a test to satisfy the Registrar that the person has an adequate knowledge of the law governing road traffic.

(4) A requirement under this section is made by a notice in writing –  
(a) addressed to the person who is required to comply with the requirement; and  
(b) specifying the time within which compliance is required; and  
(c) served on the person required to comply.

(5) A person must comply with a requirement under this section.

The legislation itself does not mandate compulsory annual driving tests for those aged 85 years and over. Rather, the "business rule" requiring those aged 85 years and over to sit an annual driving test is made under the Registrar's power under this section.

It is clear that the business rule is the only age group for which all drivers are required to sit an annual driving test. All drivers in this age group are required to sit the test, even if no concerns have been raised regarding their ability to drive. No other age group of licence holders are required to have a driving test, unless there are concerns raised about an individual driver's ability to drive.

DIER has indicated that there is "*evidence that older driver safety is closely related to age*" and that "*crash patterns for older drivers show that their driving skills deteriorate with age, particularly in relation to inattention, giving way and intersections.*" However, DIER did not provide statistical or actuarial data to support these statements.

It should be noted that in the Registrar's letter to the Ombudsman, dated 20 July 2007 (attached to "I"'s letter), the following information was provided:

- An analysis of 10 years of Tasmanian crash data (1996 to 2005) showed that older drivers (aged 65 years and over) represented six percent of serious casualty crashes.
- However, if distance travelled is taken into account, older drivers have one of the highest risks or serious injury arising from road crashes.
- Older drivers are much more likely to be severely injured or killed due to their frailty in the event of a crash. When older drivers are injured they do not recover as quickly or often as well as younger people.

It is interesting to note that the age group considered was 65 years and older, not 85 and older.

"I" noted that 6 percent is below older people's percentage in the population. Data from the Australian Bureau of Statistics shows that from 2000 – 2004, people aged 65 years and over represented between 13.5% and 14.3% of the Tasmanian population.<sup>4</sup> As of 30 June 2006, those aged 65 years and over represented 14.6% of the population.<sup>5</sup> Hence, older drivers representing 6% of serious casualty crashes between 1996 to 2005 is well below their percentage in the population.

It should also be noted that this information from DIER focuses on the risk of injury or fatality to older drivers. It does not address whether older drivers are the cause of crashes resulting in serious injury or fatality.

The NSW RTA 'Licensing of older driver Discussion paper,' released in July 2007, states that:

*"Although older people are more likely to be seriously injured or killed in a crash due to their increased frailty, the total number of fatalities amongst the older population is actually low compared to other age groups ... When factors such as distance travelled, frailty and licences per population are taken into account, older drivers may have a marginally lower crash risk per kilometre than other drivers."*<sup>6</sup>

This suggests that older drivers may have a lower crash risk than younger drivers.

Insufficient statistical or actuarial data has been provided to support the claim that older drivers are at greater crash risk because of their age. Nor could DIER point to any specific evidence to support mandatory aged-based driver testing at 85 years and over.

Accordingly, requiring all drivers aged 85 years and over to sit an annual driving test is less favourable treatment because of their age.

I note that annual medical tests are also mandatory for drivers aged 75 years and over. This is not the subject of this report and no information has been sought from the Registrar in relation to this. It should be noted, however, that medical tests may uncover any problems, such as inattention, stated to be a reason for older drivers crashing.

It should be noted that the suspension of a licence prior to a driving test does not appear to be related to age. DIER has provided information that a licence would not be suspended or cancelled prior to an annual driving test unless the Registrar was

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<sup>4</sup> Australian Bureau of Statistics, National Regional Profile: Tasmania, accessed at <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6Population/People12000-2004?opendocument&tabname=Summary&prodno=6&issue=2000-2004&num=&view=> on 31 January 2008.

<sup>5</sup> Australian Bureau of Statistics, 3235.0 – Population by Age and Sex, Australia, 2006, accessed at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/3235.0Main%20Features92006?opendocument&tabname=Summary&prodno=3235.0&issue=2006&num=&view=> on 31 January 2008.

<sup>6</sup> RTA, 'Licensing of older driver Discussion paper,' July 2007, p4. Accessed at <http://www.rta.nsw.gov.au/licensing/olderdriverdiscussionpaper.html>.



provided with information from a qualified person, such as a police officer or doctor, in support of immediate suspension. Such a suspension is linked to the information received about the person's capacity or ability to drive, rather than his or her age.

DIER also stated that an older person's licence may be suspended if he or she does not undertake a requested medical or driving test within timeframes set by the Registrar, or in some circumstances if a person fails a driving test, for example, due to being nervous.<sup>7</sup> Again, the suspension is not linked to age.

Although requiring all drivers aged 85 years and over to sit an annual driving test is prima facie discriminatory, if a complaint was lodged under the Act, I would not have jurisdiction to investigate it for the following reasons.

Section 22 of the Act states that the Act applies only to discrimination or prohibited conduct by or against a person engaged in, or undertaking any, activity in connection with any of the following:

- (a) employment
- (b) education and training
- (c) provision of facilities, goods and services
- (d) accommodation
- (e) membership and activities of clubs
- (f) administration of any law of the State or any State program on any ground specified in section 16(e), (f), (fa), (g), (h), (i) or (j)
- (g) awards, enterprise agreements or industrial agreements on any ground specified in section 16(e), (f), (fa), (g), (h), (i) or (j)

The only potentially relevant area of activity is the provision of facilities, goods and services.<sup>8</sup>

Services is defined in s3 of the Act to include services –

- (a) relating to access to, and the use of, any place that members of the public are permitted to enter
- (b) relating to banking, insurance, superannuation or the provision of grants, loans, credit or finance
- (c) relating to entertainment, refreshment or recreation
- (d) relating to transportation and travel
- (e) relating to any profession, trade or business
- (f) provided by a State authority or a council
- (g) relating to selling, buying, leasing, assigning or disposing of an interest in land

Jurisprudence from the Tasmanian Anti-Discrimination Tribunal and the Supreme Court of Tasmania indicates that if a body or person is performing a statutory power or duty it is not providing a service: *Murphy v Family Court of Australia* [2002] TASADT 9, citing Brennan CJ and McHugh J in *IW v City of Perth* (1997) 191 CLR 1 at 15; *Daly and Swanton v Australian Broadcasting Authority* [2005] TASADT 2 at

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<sup>7</sup> The Registrar's power to suspend a licence is contained in Regulation 25 of the *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000*.

<sup>8</sup> It should be noted that whether or not the Registrar could be considered to be administering a law of the State, age is not an attribute that is covered by this area of activity.

[23]; *Secretary of the Department of Justice and Industrial Relations v Anti-Discrimination Commissioner* [2003] TASSC 27.

The Registrar, in requiring drivers aged 85 years and over to sit an annual driving test, is exercising a statutory power and duty under s56 of the *Vehicle and Traffic Act* 1999.

Pursuant to s56(1)(b) of the *Vehicle and Traffic Act*, the Registrar may require a person to undergo a test or assessment to satisfy the Registrar that he or she has adequate knowledge of safe driving practices and adequate skill in their application. The Registrar is also entitled under s56(3) to require a person to submit to a test to satisfy the Registrar that he or she has an adequate knowledge of the law governing road traffic. Section 56(5) states that a person must comply with a requirement under this section.

Requiring a person to submit to a driving test, as per a statutory power, is unlikely to be considered the provision of a "service" to the person. The requirement is relevant to the assessment as to whether the person should continue to hold a licence. The Registrar is thus exercising a statutory power (requiring a test, which the person must comply with) and performing a statutory duty (determining whether a person should hold a driver's licence). The Registrar is acting as an arm of government, rather than acting as a "servant" of the person required to submit to the test.

Accordingly, although the business rule is prima facie discriminatory, I have no jurisdiction to investigate any complaint made on this basis.

I am concerned that although requiring all drivers aged 85 years and over to submit to an annual driving test is age discrimination as defined by the Act, complainants have no recourse in this jurisdiction for the above reasons.

I am also concerned that no substantial statistical or actuarial data has been produced in support of either requiring the rule in the first instance, or to support the effectiveness of the rule in practice.

I note that DIER has been monitoring the trial of a new system in Western Australia, based on a model developed by Austroads ("the Austroads system"). Key features of the Austroads system, as outlined by DIER, include:

- The aim of the system is to identify those older drivers who demonstrate some preliminary evidence of being at risk, to use screening within the community and a referral-based model for driver testing.
- The system requires medical practitioners and other health professionals to use a screening tool to identify at risk drivers.
- The system also relies on the wider community, such as police, care organisations, insurance companies and the driver's family members, to provide information about a driver's ability.
- When an at risk driver is identified, the licensing authority is notified.
- The licensing authority uses an "off-road assessment tool" to identify whether the person is a safe driver.

- Depending on the result of the off-road assessment, the driver may continue driving, be referred to a specialist, be required to undertake a driving test or have their licence suspended or cancelled.
- The system also provides support to the driver by way of a Case Officer.

This is broadly consistent with a proposal put forward by Doug Ling, Chief Engineer with RACT, as outlined in *The Mercury* article.

Mr Ling described the current system requiring those aged 75 years and over to have an annual medical test and those aged 85 years and over to sit an annual driving test as ageist and ineffective. He proposed that the system be replaced with a one-on-one assessment referral process. Under his proposal, all drivers and their families would be encouraged to monitor their own health more closely and to report any concerns.

One different feature is that Mr Ling proposed that doctors and optometrists would be legally required to report patients who have problems that could impair their driving. DIER opposes the introduction of mandatory notification by medical practitioners unless it has the full support of the medical profession.

DIER also noted that both the Austroads system and the system proposed by Mr Ling exclude mandatory restrictions, as proposed in NSW. In the RTA's discussion paper,<sup>9</sup> it was proposed to replace the current older driver licensing system (including mandatory annual driving tests for drivers aged 85 years and over) with a graduated licensing system in which restrictions are progressively placed on older drivers. Rather than requiring an annual driving test for all drivers aged 85 years and over, upon turning 85 a 10km radius restriction would be placed on the driver's licence. If a driver aged 85 years or over wished to remove or modify the restriction, they would be required to pass a driving test. The radius restriction is based solely on age and not ability to drive. Accordingly, I believe that this is a discriminatory proposal for the same reasons as above.

The Austroads system and Mr Ling's proposal both focus on self-monitoring and also monitoring by health professionals and the wider community. The focus is on identifying "at risk" drivers and then undertaking further assessment of those drivers, rather than requiring driving tests merely because a driver reaches a certain age, as in the current system. It is a non-discriminatory alternative, focussing on a driver's ability rather than age.

It should also be noted that DIER has already taken steps to support a notification approach, such as providing presentations to medical practitioners about the licensing and notification process.

### **Recommendations:**

In light of the above, and in accordance with s6(a) of the Act, I make the following recommendations:

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<sup>9</sup> RTA, 'Licensing of older driver Discussion paper,' July 2007, p7-8. Accessed at <http://www.rta.nsw.gov.au/licensing/olderdriverdiscussionpaper.html>.

- That the Tasmanian Government undertakes further research regarding the crash risk of older drivers.
- That the Tasmanian Government gives priority to implementing an alternative older driver licensing system in a timely manner, such as the Austroads system.
- That consideration be given to whether mandatory reporting by medical practitioners should be a feature of any alternative system, and that this involve consultation with the medical profession.
- That any alternative older driver licensing system does not feature mandatory radius restrictions.

Sarah Bolt  
**Anti-Discrimination Commissioner**