

Fourth Study Commission

Public and Social Law

AGE DISCRIMINATION AND EMPLOYMENT IN AUSTRALIA

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SUPREME COURT OF SOUTH AUSTRALIA

1.1. Are there rules against age discrimination which have constitutional status? What do these rules say precisely, and how do they work at lower levels of law making?

The Australian Constitution provides no express or implied protection against age discrimination.¹ Rather, the Constitution gives the Commonwealth the power to legislate over discrimination, including age discrimination, pursuant to the heads of power in section 51 of the Constitution.

1.2. Which international agreements and conventions dealing with age discrimination has your country ratified?

Australia has ratified or acceded to four international instruments related to age discrimination. They are:

- *The International Covenant on Civil and Political Rights;*
- *The International Covenant on Economic, Social and Cultural Rights;*
- *The Convention on the Rights of the Child; and*

¹ *Leeth v The Commonwealth* (1992) 174 CLR 455, Mason CJ, Dawson & McHugh JJ, 468.

- The International Labour Organisation’s *Discrimination (Employment and Occupation) Convention 1958*.

1.3. What are the main sources of law against age discrimination?

Age discrimination is covered by legislation in every jurisdiction in Australia. At the Federal level, the material Acts are the *Workplace Relations Act 1996*, and the *Age Discrimination Act 2004*. The relevant State and Territory Acts are set out in the table below:

Jurisdiction	Statute(s)	Administering Body	Tribunal
New South Wales	<i>Anti-Discrimination Act 197</i> <i>Administrative Decisions Tribunal Act 1997</i>	Anti-Discrimination Board of NSW	Administrative Decisions Tribunal- Equal Opportunity Division
Victoria	<i>Equal Opportunity Act 1995</i>	Victorian Equal Opportunity and Human Rights Commission	Victorian Civil and Administrative Tribunal
Queensland	<i>Anti-Discrimination Act 1991</i>	Anti-Discrimination Commission Queensland	Anti-Discrimination Tribunal of Queensland
South Australia	<i>Equal Opportunity Act 1984</i>	Equal Opportunity Commission	Equal Opportunity Tribunal
Western Australia	<i>Equal Opportunity</i>	Equal Opportunity	Equal Opportunity

	Act 1984	Commission	Tribunal
Tasmania	Anti-Discrimination Act 2007	Office of the Anti-Discrimination Commissioner	Anti-Discrimination Tribunal
Australian Capital Territory	Discrimination Act 1991 Human Rights Commission Act 2005	Human Rights Commission	Discrimination Tribunal
Northern Territory	Anti-Discrimination Act 1992	Northern Territory Anti-Discrimination Commission	Northern Territory Anti-Discrimination Commission

1.4. Are collective agreements bound by these provisions?

Yes.

1.5. Which groups are protected by these provisions, younger employees, older employees? Or, is it just forbidden to consider age as a decisive factor for working conditions?

The *Age Discrimination Act*, like State and Territory anti-discrimination legislation, employs a uniform blanket protection against age discrimination that purports to protect both the young and the old, subject to statutory exceptions. However, in most jurisdictions there are particular provisions to protect minimum wage entitlements for young workers.

2. ‘Unlawful age discrimination’

2.1. Please specify the criteria for an ‘unlawful age discrimination’

In all jurisdictions in Australia, discrimination can be both direct and indirect.

Section 14 of the Commonwealth Act defines direct discrimination as where a person (the discriminator):

a) Treats or proposes to treat another person (the aggrieved person) less favourably than, in circumstances that are the same or are not materially different, the discriminator would treat a person of a different age; and

b) The discriminator does so because of:

- The age of the aggrieved person; or

- A characteristic that appertains generally to persons of the age of the aggrieved person; or

- A characteristic that is generally imputed to persons of the age of the aggrieved person.²

In order to establish less favourable treatment, there must be an objective comparison between the complainant and another employee.

The complainant must also establish a causal link between the employer's decision and the employee's age. Under all State and Territory laws, the employee's age must be a reason for the negative treatment.³ However, under the Commonwealth Act, where a person is treated in a particular way for two or more reasons, the Act imposes a *dominant reason* test for the purpose of identifying age discrimination. Section 16 of the Commonwealth Act states:

“If an act is done for 2 or more reasons, then, for the purposes of this Act, the act is taken to be done for the reason of the age of the person only if:

(a) One of the reasons is the age of the person; and

(b) That reason is the dominant reason for the doing of the act.”

² ADA s 14

³ *Anti-Discrimination Act 1977* (NSW) s. 49ZYA; *Equal Opportunity Act 1995* (Vic) s. 8(2)(b); *Anti-Discrimination Act 1991* (Qld) s. 10(1); *Equal Opportunity Act 1984* (WA) s. 66V(1)(c); *Equal Opportunity Act 1984* s. 85A(c); *Anti-Discrimination Act 1998* (TAS) s. 14(2); *Discrimination Act 1991* (ACT) s. 8(1)(a); *Anti-Discrimination Act 1992* (NT) s. 20(2)(c).

Indirect discrimination concerns practices which are fair in form and intention, but discriminatory in impact and outcome.⁴

Section 15 of the Commonwealth *Age Discrimination Act* defines indirect discrimination as one where the discriminator:

- a) Imposes, or proposes to impose, a condition, requirement or practice; and
 - i. The condition, requirement or practice is not reasonable in the circumstances; and
 - ii. The condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same age as the aggrieved person.
- b) For the purposes of paragraph 1(a), the burden of proving that the condition, requirement or practice is reasonable in the circumstances lies on the discriminator.⁵

State and Territory laws provide for indirect discrimination in similar terms.⁶

Condition or requirement

A condition or requirement as referred to in the legislation covers any form of qualification or pre-requisite,⁷ and may be explicit or implicit from the employer's conduct.⁸ The complainant must then establish that he or she could not comply with the relevant requirement because of that person's age.

Reasonableness

The Federal provision is similar to the indirect discrimination provisions in the *Sex Discrimination Act*. However, unlike the *Sex Discrimination Act*, the *Age Discrimination Act* does not contain any reference to the matters to be taken into

⁴ *Secretary, Department of Foreign Affairs v Styles* (1989) 23 FCR 251

⁵ ADA s 15.

⁶ NSW s. 49ZYA(1)(b); VIC s. 9; QLD s. 11; SA s. 85A1(b); WA s. 66V(3); TAS s. 15; ACT 8(1)(b); NT s. 20.

⁷ *Australian Iron and Steel v Banovic* (1989) 168 CLR 165 at 185 per Dawson J.

⁸ *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 360

account when determining whether a condition, requirement or practice is 'reasonable'.⁹ 'Reasonableness' has been judicially considered in a significant number of indirect discrimination cases based on the *Disability Discrimination Act*,¹⁰ which may prove relevant to the interpretation of s. 15 in the future.¹¹ Factors which have been taken into account in determining reasonableness include:

- The existence of alternative methods which could achieve the employer's objective in a less discriminatory way;
- The maintenance of good industrial relations;
- Occupational health and safety requirements;
- Efficient business practice;
- The interests of other employees;
- Customer preferences;
- Public policy;
- Cost.¹²

Generally, a condition or requirement will be considered reasonable if:

- It was imposed to perform a particular activity necessary to the employer's business;
- It operates effectively and with efficacy;
- The cost of not imposing the discriminatory requirement or of substituting another requirement is excessive; and
- It is appropriate and adapted to the performance of the relevant activity.¹³

⁹ The *Sex Discrimination Act s. 7B* provides the factors as including: (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; (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.

¹⁰ See Chapter 5.2.3(d) HREOC- DDA

¹¹ Chapter 2: The Age Discrimination Act HREOC at 6.

¹² *State of Victoria v Schou (No 2)* (2004) 8 VR 120; *Gardiner v Stte of New South Wales* [2004] NSWADTAP 1 (2004) EOC [93314]; *Bonella v Wollongong City Council* [2002] NSWADTAP 26; (2002) EOC [93244].

The discrimination described above is only unlawful under Australian law if it occurs in specific circumstances prescribed under the relevant acts, and does not fall within a prescribed exception. Under the Federal law, discrimination is unlawful if it occurs the context of employment and related matters; education; access to premises; provision of goods, services and facilities; provision of accommodation; disposal of land; and, the administration of Commonwealth laws and programs.¹⁴

3. Are there provisions that impose maximum or minimum age requirements on employee hiring?

In each State or Territory there are laws in place that limit the employment of children or minors. The *Workplace Relations Act 1996* (Cth) provides that employer under the federal system will still be covered by State and Territory laws relating to child labour,¹⁵ and federal awards or agreements are taken to operate subject to such laws.¹⁶ This has allowed some States to introduce protection for employees under the age of 18 that might be unavailable to adults in the federal system. For example, the *Industrial Relations (Child Employment) Act 2006* (NSW) provides that a minor cannot be employed on conditions below State award conditions.¹⁷ A minor can also bring an unfair dismissal claim in NSW, even if employed in a business with less than 100 employees. Queensland has similar laws.¹⁸ Western Australia has also moved to introduce such legislation.¹⁹

The *Child Employment Act 2003* (Vic) provides that nobody under the age of 15 may be employed without a permit, other than in a family business.²⁰ Certain conditions are imposed, including limitations on hours of work. There are also prohibitions on the employment of children in particular industries (such as door to door selling), or during school hours.²¹ Similar provisions can be found in Western Australia,²² and the ACT.²³

¹³ *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 378 and *Secretary, Department of Foreign Affairs v Styles* (1989) 23 FCR 251.

¹⁴ ADA s.17

¹⁵ S 16(3)(e)

¹⁶ S 17(2)(d); *Workplace Relations Regulations 2006* Ch 2 reg 1.6(1)

¹⁷ See *Child Employment Principles Case 2007*

¹⁸ *Child Employment Act 2006* (Qld) Pts 2A, 2B.

¹⁹ See *Industrial and Related Legislation Amendment Bill 2007* Pt 4.

²⁰ *Child Employment Act 2003* (Vic) s.

²¹ *Child Employment Act 2003* (Vic) s.

²² *Children and Community Services Act 2007* (WA) s. 190, 191.

²³ *Children and Young People Act 2008* (ACT) s. 795-797.

In South Australia, there is no minimum age of employment. Although the *Fair Work Act 1994* (SA) contains provisions designed to protect all employees, many are not targeted at the special needs of employees under the age of 18.²⁴ SafeWork SA, the body responsible for administering industrial relations law in South Australia, is currently considering child employment legislation. Such legislation would focus on protecting children from exploitation and harm such as work at a too early age, inappropriate hours, or where the nature of the work makes such work undesirable.²⁵ Currently, section 78 of the *Education Act 1972* prohibits employment of school age children during school hours. Similar provisions have been enacted in Tasmania²⁶ and Queensland.²⁷

In the Northern Territory, no person, whether he or she be a parent of the child is allowed to employ a school age child either during school hours, or at any time of the day or night which would render the child unfit to attend school.²⁸ In addition, the *Care and Protection of Children Act 2007* imposes a minimum employment age of 15.²⁹

4. Is there a minimum or maximum age for entering pension funds systems?

Seniors have access to the Age Pension when they attain the age of 65. There is no maximum age requirement.³⁰

5. Has Australia got collective regulations or statutory provisions, which give certain protections or certain allowances upon the attainment of a certain age?

Generally no, but see question 6 on youth wages.

²⁴ S. 98A gives the Commission the power to make awards relating to child labour determining that children should not be employed in particular categories of work or in an industry, impose special limitations on hours of employment of children, provide for special rest periods for children, provide for the supervision of children who work, make any other provision relating to the employment of Children as the Commission thinks fit...the Commission may, in making an award under this section, make a determination that only relates to children of a specified age or ages.

²⁵ http://www.safework.sa.gov.au/show_page.jsp?id=7477

²⁶ *Education Act 1994* (TAS) s 82.

²⁷ *Child Employment Act 2006* (QLD) ss. 10, 11.

²⁸ *Education Act 1979* (NT) s. 30.

²⁹ s. 203

³⁰ http://www.centreforlink.gov.au/internet/internet.nsf/payments/age_eligible.htm

6. Does the computation of wages depend on the age of the employee?

In most cases, federal system employees under the age of 21 or subject to a training arrangement will be covered by a pay scale according to an award.³¹ A common arrangement is for 16 year olds to get 50% of the relevant adult wage, 17 years old to get 60% and so on. As for trainees, their rates are in many instances determined in accordance with the National Training Wage Award 2000.

Section 222 of the Commonwealth *Workplace Relations Act 1996* (Cth) requires the Australian Fair Pay Commission to apply and consider anti-discrimination principles set out in the *Age Discrimination Act 2004*.

Each State or Territory imposes minimum wage requirements that are dependent on the age of the employee. In South Australia, the minimum wage for children 17 years and under is the same, and then increases incrementally each year until 21 years,³² at which point any increase in wages is dependent on merit. The Commonwealth and State and Territory anti-discrimination laws contain an exception for discrimination that occurs in the context of applying youth wages.³³ Youth wages are an important and well-established part of Australian industrial law and enable young people to be competitive in the job market.

Conclusion- the limits of the law

It is important to note that the mechanisms in place to deal with discrimination, including legal remedies, will be limited by the underlying negative stereotypes about older workers. Age discrimination and its legal recourses do not exist in a vacuum, but in the

³¹ Stewart, A. *Stewart's Guide to Employment Law*, Federation Press (2008), 182

³² http://www.safework.sa.gov.au/show_page.jsp?id=5116

³³ NSW s. 49ZYT, 49ZYU; VIC s. 26, QLD s. 33; SA s. 85F; TAS s. 36; ACT s. 57B.

context of an ageist society. Negative stereotypes continue to permeate our society and present a barrier for older workers in obtaining and retaining employment.³⁴

Hidden Discrimination

One difficulty of regulating age discrimination is identifying the unlawful discriminatory behaviour when is cloaked in terms of lawful discrimination. This is partly a product of the ageist-values society we live in.

Consider Jonathon Hunyor's analysis of racial discrimination. He argues that the Race Discrimination Act does not necessarily protect people from racial discrimination in the context of employment, but rather, in some cases, makes the problem 'invisible'.³⁵ Discrimination on the basis of race has not disappeared, but has been cloaked in language of discrimination based on other personal characteristics perceived as undesirable, such as being softly-spoken.³⁶ The perception of such a trait may be the result of subconscious racial stereotyping and constitute discrimination, but is acceptable because it has been argued on grounds of merit rather than the individual's ethnicity. The same may occur with age-based discrimination. Employers can set out criteria which can be legitimately used for employers to find a suitable employee, but can also mask ageist biases. One Victorian study found that even though it was illegal to advertise age preferences for jobs, some advertisements 'still provide[d] numerous clear messages about the preferred age range through the use of "age specific descriptors" such as "young environment".³⁷

Individual Complaints Based

While the precise complaints-process varies between States and Territories, it remains a common feature that individuals must take responsibility for making the complaint. Reporting discrimination at the initial stages requires that the complainant know about his or her rights and options. Victims of discrimination are often members of a minority and may feel disempowered to begin with, which is exacerbated by their negative

³⁴ Easteal, Ceung and Priest "Too Many Candles on the Birthday Cake: Age discrimination, Work and the Law" in Vol 7 No 1 QUILJ at 95.

³⁵ Hunyor, J. 'Skin Deep: Proof and Inferences of Racial Discrimination in Employment' in *Sydney Law Review* 24 (2003)

³⁶ Ibid.

³⁷ Bennington, L. 'Age Discrimination: Converging Evidence from Four Australian Studies' (2001) 13 *Employee Responsibilities and Rights Journal* 125.

experience.³⁸ It may be difficult for a victim of discrimination to define what has happened to them as discrimination. Given the tendency for employers to mask age-discriminatory language in terms of other more acceptable language (as described above), it can be difficult for a victim to clearly define the grounds of the discriminatory treatment.³⁹

Low Reporting

Reporting statistics show that there have been relatively few successful complaints. For example, in 2007-2008, HREOC received just 126 complaints relating to age discrimination. This compares with 376 complaints received relating to racial discrimination, 438 received relating to sex discrimination and 988 received relating to disability discrimination for the same financial year.⁴⁰ Of 126 age discrimination complaints, 114 were conciliated under the *Age Discrimination Act*.⁴¹

Problem of Proof

Difficulty establishing that conduct was discriminatory may contribute to the low reporting statistics and the relatively low frequencies of conciliations and hearings. Although the *Age Discrimination Act* has been in place for approximately four years, it has yet to feature in a case in a higher court.

It can also be difficult to connect an employer's behaviour with a ground of discrimination. This is especially difficult given that an employer is unlikely to openly tell an employee or an applicant that he or she is being treated in a particular way because of his or her age:

*“Decision made in the secrecy of boardrooms or in the minds of employers will rarely, if ever...find expression to the employee in directly discriminating terms. Still less will they be exposed to the potentially corroborative eye of a witness, especially as the most likely witnesses, fellow employees, may well entertain the fear of losing their jobs at the hands of the same employer.”*⁴²

³⁸ Ibid

³⁹ Easteal, Ceung and Priest “Too Many Candles on the Birthday Cake: Age discrimination, Work and the Law” in Vol 7 No 1 QUILJ at 98

⁴⁰ Ibid

⁴¹ *Australian Human Rights and Equal Opportunity Commission 2007-2008 Annual Report* p 63.

⁴² *Bennett v Everitt* (1988) EOC 92-244, 77, 271 (Einfield J).

The nexus between behaviour and ground is even harder to establish in age discrimination cases:

“With age discrimination unless a direct comment is made connecting the alleged unfavourable treatment to the complainant’s age, and there is some evidence that this comment was made, it is difficult to show a causal connection between age and the unfavourable treatment.”⁴³

Even though our legislation reflects a negative stance towards age discrimination, it is predicted that without significant education of employers over a lengthy period of time, discrimination will continue.

⁴³ Easteal, Ceung and Priest “Too Many Candles on the Birthday Cake: Age discrimination, Work and the Law” in Vol 7 No 1 QUITLJ at 101