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No. 29 2003–04

## Age Discrimination Bill 2003

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Age Discrimination Bill 2003

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8 September 2003

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# Age Discrimination Bill 2003

**Date Introduced:** 26 June 2003

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The day after Royal Assent

## Purpose

To prohibit age discrimination in certain specified areas and to provide exemptions from the prohibition in certain other areas.

## Background

### Basis of policy commitment

The proposal to introduce age discrimination legislation into Australia at a Federal level has been on the table for some time. The Keating Government pledged to introduce age discrimination legislation if re-elected in 1996.<sup>1</sup> It had earlier established an Age Discrimination Taskforce and in 1995 the Government's 'National Action Plan' talked of the Taskforce's examination of possible age discrimination legislation. It also discussed the abolition of compulsory age retirement in the Commonwealth public sector.<sup>2</sup> This actually took place under the following administration in 1999 through the *Public Service Act 1999*, which came into effect on 6 December 1999.

The federal government has stated its intention to address age discrimination on a number of occasions. In its 1996 pre-election policy *Security for Older Australians*, the Coalition made commitments to ensure that legislation abolishing compulsory retirement would be passed in all areas of Commonwealth responsibility. That decision was implemented in December 1999. It also promised to take necessary action to remove age discrimination from all employment and to allow persons over 65 to continue contributing to a regulated superannuation fund when they maintain a bona fide link with the workforce.<sup>3</sup>

In 1999, the International Year of Older Persons, the government announced the development of a *National Strategy for an Ageing Australia*. The Strategy was a broad

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national framework for action to address the challenge of an ageing population. Age discrimination was identified as a major barrier to the employment of mature and older workers.

The Coalition renewed its commitment to age discrimination legislation during the 2001 election, as both the Explanatory Memorandum and Second Reading Speech highlight,<sup>4</sup> and the current Bill is the result of a consultation process on a paper released by the Attorney-General's Department in December 2002. This information paper, which had been prepared in consultation with the 'Core Consultative Group', was available and open for comment until 12 February 2003.

### **Position of significant interest groups/press commentary**

There has not been a significant degree of commentary upon the introduction of this Bill. The information paper released in December 2002 excited some media commentary, however as well as welcoming the legislation there were also criticisms along the line that such measures were overdue. So, for instance, the Council of the Ageing executive director, Denys Correll made comments about the overdue nature of the response to the *Sunday Telegraph*,<sup>5</sup> while *The West Australian* said:

The Federal Government and its predecessors took an unreasonably long time to come up with proposals for age discrimination legislation.<sup>6</sup>

There was, however, amongst the commentary, a strong and general sense that older workers are discriminated against and that the economic impact of an ageing population must be dealt with by the Government. There also seems to have been an overall approval of the proposals for the legislation, with comments such as '[t]he proposed anti-age discrimination laws outlined by Attorney-General Daryl Williams last week appear to be a sensible and well-balanced approach to the issue.'<sup>7</sup> *The Age* commented that the legislation is both 'welcome and overdue.'<sup>8</sup>

Despite this general approval there are those who still feel that the legislation is ill advised. For instance the Australian Chamber of Commerce and Industry (ACCI), whose chief executive, Peter Hendy, has been reported as saying 'the proposed laws could hurt efforts by business to get the best from employees.'<sup>9</sup>

Proposed federal anti-age discrimination laws could discriminate against most workers, the Australian Chamber of Commerce and Industry said yesterday... Mr Hendy said the proposal would simply create havoc among businesses trying to employ the most suitable people. The system could actually hurt the majority of workers, with businesses openly pushed towards employing older and younger people.

"If an employer planned to employ more people at a young age and more people of a mature age, this by definition means that persons of middle age in between these age

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cohorts are less favourably treated,” he said. Mr Hendy said the laws could open the floodgate to employees demanding easier work conditions because of their age.

Already the workers’ compensation system enabled employees to be put on lighter duties or jobs of limited productivity. “It is quite conceivable that, without proper exemptions in place, performance or productivity criteria in industry would be exposed to complaint or challenge under the indirect age discrimination concept,” he said. “It may also mean that employers are required to increasingly provide light or limited duties for persons of a particular age category to avoid the risk of complaint or litigation.”

It should be pointed out here that there are, in fact, exemptions provided in the legislation which recognise that discrimination on the basis that someone cannot perform the inherent requirements of a job is not classified as prohibited discrimination. Furthermore there is no suggestion that prohibiting age from being used as a proxy for ability and performance should mean that no distinctions on the basis of performance should occur.

There have also been more specific concerns raised by other groups. The Council of the Ageing, while in favour of age discrimination legislation overall, were concerned by a number of aspects of the Bill. They have particular concerns about, inter alia,

- The width of the exemptions given to the Commonwealth, which they describe as demonstrating the ‘Commonwealth’s own reticence in embracing its own age discrimination laws.’ The Council expressed concern that by taking this approach the Commonwealth ‘provides a negative role model to the community.’
- The situation of age discrimination within the framework of the Human Rights and Equal Opportunity Commission. More specifically they are concerned to ensure that age discrimination has its own Commissioner (a concern that may or may not be alleviated by the proposal to abolish all specifically focussed Commissioners contained in the Bill currently before the Parliament, the Australian Human Rights Commission Legislation Bill 2003). They also identify the lack of funding for and difficulties in taking cases to the Federal Court as impediments to the proposed Bill’s effective functioning.<sup>10</sup>

The Human Rights and Equal Opportunity Commission (or HREOC or the Commission) published a Report, *Age Matters: a report on age discrimination* in May 2000 (*Age Matters*) and also responded specifically to the Attorney-General’s information paper.<sup>11</sup> Some of its particular concerns with the Government’s proposals were:<sup>12</sup>

- The absence of provisions dealing with ‘relatives and associates’. The possibility of a provision covering discrimination on the basis of the age of a person’s relative or associate has been raised but is not included in this Bill. Such provisions exist in the *Disability Discrimination Act 1992* (the DDA) and the *Race Discrimination Act (1975)* (the RDA), as well as other State and Territory laws.

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- Unlike other anti-discrimination legislation there is no coverage of ‘clubs’, ‘incorporated associations’ and ‘sport’. The Commission regards these areas as significant and participants in the area as worthy of protection against age discrimination. It recognises there could be difficulties at the level of constitutionality but would seem to believe these could be overcome. It also comments that such provisions would need to be drafted in such a way as to preserve good sporting practices, with exceptions similar to those governing sport in the *Sex Discrimination Act (1984)* (SDA)).
- The definition of employment may be insufficiently broad-ranging. In HREOC’s experience in the field it has found that new forms of employment are developing which may fall outside of the definition of ‘employment’ used in this Bill.
- The failure to comprehensively cover unpaid workers (though not within the domestic sphere). While HREOC already has some powers to hear complaints about unpaid workers if they are undertaking work in order to pursue a particular occupation or to gain employment there is no general coverage of this area. The Commission points out that unpaid workers make a significant contribution to the community and should be covered.
- The Commission does not support the specific and permanent exemptions for youth wages, job training programs & etc. It points out that acts done in compliance with awards, industrial agreements or Commonwealth legislation are already effectively exempted. The *Age Matters* Report covered the issue of youth wages in more detail and the Commission suggests that they need to be the subject of on-going investigation and negotiation, and should be seen as an issue that needs to be addressed rather than something with a static and permanent exemption.
- The Commission believes that the exemption given to providers of credit (see the Main Provisions for more details) is uncalled for. To concerns that complaints of indirect discrimination could undermine good business practice they point out that the defence of reasonableness would be available to a respondent.

It is apparent on the face of the Bill that there is a focus on the concerns of older workers rather than younger.<sup>13</sup> According to at least one report many youth advocates ‘are angry that changes to Federal Government age discrimination laws... ignore young people in favour of protecting older employers.’<sup>14</sup> This report goes on to point out that ‘of the 30 people involved in the [core] consultative group set up by the Federal Government to review the current laws, only four represented youth organisations.’<sup>15</sup> One of the issues concerning youth which arguably remains unresolved is the question of youth wages. This has been a troubled area which has resurfaced in an on-going manner.

As mentioned above, *Age Matters* examined this issue closely, in particular considering the review undertaken by the Australian Industrial Relations Commission (AIRC). HREOC reports that:

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In June 1999 the Australian Industrial Relations Commission reported the findings and recommendations of its *Junior Rates Inquiry*, which had considered whether the federal exemption, which currently applies to the *Workplace Relations Act 1996*, so that many industrial awards and agreements are exempted from the anti-discrimination provisions, should be lifted. Key findings were:

1. none of the alternatives to junior rates presented to the Commission were feasible, although the inquiry did not rule out the existence of alternatives
2. an immediate and general removal of the existing junior rates would have a detrimental affect on youth unemployment
3. well-designed junior rates may justifiably be used for creating or protecting employment opportunities for young employees.

The AIRC also concluded that:

- junior rates were relatively useless in securing direct entry to full-time employment
- in designing non-discriminatory alternatives to junior rates, a no one size fits all approach has merit
- feasible alternatives to junior rates may exist although these were not presented to the inquiry.

HREOC noted that ‘the unanimous view of youth organisations and young people in submissions to the [age discrimination] inquiry [were] that junior rates are exploitative, not protective, and should be repealed.’<sup>16</sup> The Commission concluded that there was inconclusive evidence about what effect abolishing youth wages would have on the youth labour market overall. Robert Ludbrook, of the National Children’s and Youth Law Centre in Sydney has commented:

The law is grossly unfair. People would say equal pay for equal work when they think about women in the workplace, but that does not seem to apply to young people. The justification for this is two-fold.

People say because young people lack experience and maturity they are usually not as good workers as older people; and that if kids receive the same pay as adults then employers will hire adults instead, but there is no evidence to support either of these propositions.<sup>17</sup>

The ALP has called youth wages discriminatory<sup>18</sup> but has supported the *Workplace Relations Amendment (Youth Employment) Act 1999*, which adopted a compromise position on the issue. The Act provides for junior rates to be permanently exempt from existing anti-discrimination provisions but also provides for junior rates to be assessed on a case by case basis and permitted where they would assist youth employment. In the past

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the Government issued Press Releases saying that the absence of an exemption from anti-discrimination legislation for youth wages in Labor's legislative plan would involve abolishing age-based youth wages.<sup>19</sup>

HREOC concludes that while a permanent exemption for youth wages cannot be justified there are ways of trialling and developing alternatives for the non-discriminatory employment of young people. In particular they are also concerned that young people require 'an appropriate avenue of redress for job refusals or job loss once they reach adult years.'<sup>20</sup>

## Pros and cons

### An ageing population

The evidence that Australia has an ageing population is incontrovertible. Indeed this is happening in a large number of first world countries. The United Nations Second World Assembly on Ageing in Madrid, Spain issued a Political Declaration which said:

#### Article 2

We celebrate rising life expectancy in many regions of the world as one of humanity's major achievements. We recognize that the world is experiencing an unprecedented demographic transformation and that by 2050 the number of persons aged 60 years and over will increase from 600 million to almost 2,000 million and the proportion of persons aged 60 years and over is expected to double from 10 per cent to 21 per cent. The increase will be greatest and most rapid in developing countries where the older population is expected to quadruple during the next 50 years. This demographic transformation challenges all our societies to promote increased opportunities, in particular for older persons to realize their potential to participate fully in all aspects of life.<sup>21</sup>

The Explanatory Memorandum lists a number of studies and reports which document the changes and projected changes in the age of our population. These include:

- the Treasurer's *Intergenerational Report*, 2002-03 Budget Paper No. 5 (the Intergenerational Report)
- *Population Ageing and the Economy* Jan 2001, by Access Economics Pty Ltd (the Access Economics Report), and
- the Social Policy Research Centre *The Recruitment of Older Australian Workers: A Survey of Employers in a High Growth Industry* (December 2001) (The Social Policy Research Centre report).

It goes on to select some of the more relevant sets of figures from the data available, including these two:

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The *Intergenerational Report* shows that the ageing of the population will dramatically increase the number of older people, with significant implications for the economy. While the total population of labour force age is projected to grow by just 14 per cent, the number of people aged 55 to 64 is projected to increase by more than 50 per cent over the next two decades.<sup>22</sup>

and

The Treasurer's *Intergenerational Report* noted that in 2002, the proportion of people aged over 65 to people of traditional labour force age, (15 to 64) was 19 per cent. This is projected to rise to almost 41 per cent by 2042 (p. 23).<sup>23</sup>

Clearly the economic considerations of an ageing workforce and a population in which there are many more older people relying for support on a shrinking pool of workers forms a major impetus for the legislation. The Australian Council of Trade Unions (ACTU) and the Business Council of Australia (BCA) commissioned a report (called 'Age Can Work: The Case for Older Australians Staying in the Workforce') which resulted in the following comment by Sharan Burrow, the ACTU President, and Katie Lahey, the BCA's chief executive:

As a result [of demographic changes] while there are currently six working Australians supporting each retired person, by 2025 this ratio will be one to three.<sup>24</sup>

#### A discriminating population

As well as an ageing population it would seem clear that Australia has a strong vein of age discrimination in the workforce. All three of the reports:

- *Age Counts – An Inquiry into issues specific to mature-age workers*, June 2002, from the House of Representatives Standing Committee on Employment, Education and Workplace Relations<sup>25</sup>
- *Age Matters* from HREOC, and
- *Planning for retirement*, July 2003, from the Senate Select Committee on Superannuation

provide extensive evidence of age-based discrimination in the Australian workforce. The evidence in these reports does not sit well with the ACCI claims that:

There is no significant evidence of Australian industry applying policies or practices that improperly discriminate against people on the grounds of age such as to warrant a new national regulatory regime...<sup>26</sup>

One of the most oft quoted studies in the area was by the Drake Consulting Group,<sup>27</sup> and it found that of the top 500 human resource executives none would chose to employ

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managers and executives in their 50s and 65% said this group would be the first to go in the event of retrenchments.<sup>28</sup> Other findings included:

- sixty-two per cent choose their executives from the 31-40 age group
- only 23 per cent prefer those in the 41-50 age bracket, and
- almost 16 per cent opt for 20 to 30-year-olds.<sup>29</sup>

Since this study was conducted the marketing director for Drake has said that the problem has got worse:

There are indications that ageism in Australian business has grown since then... in 1999 ageism was concentrated in the top companies, but now it seems to have cascaded down to medium-sized businesses.<sup>30</sup>

A UNSW academic from the Research Centre on Ageing and Retirement commented that Australians tend to:

[c]onfuse age with a lack of acuity and are overwhelmed with respect for newness, novelty and technology...we have not paid due respect to the wisdom that age brings.<sup>31</sup>

The proposition that the problem is even more acute in Australia than comparable countries is given support by the following figures:

[In Australia] the percentage of people aged 55-64 in the work-force is 49 per cent. This compares with 59 per cent in the US, 60 per cent in New Zealand and 67 per cent in Scandinavia.<sup>32</sup>

### International Context

Age and ageing is developing into an issue of international concern. For instance the Explanatory Memorandum refers to the Second World Assembly on Ageing and the resulting *Political Declaration* and the *Madrid International Plan of Action 2002*.<sup>33</sup> Concerns regarding the rights of the young have been around for a little longer, as evidenced by the United Nations *Convention on the Rights of the Child* (to which Australia became a party in 1990).<sup>34</sup>

Other relevant international instruments include:

- The *Discrimination (Employment and Occupation) Convention, 1958* adopted by the General Conference of the International Labour Organization on 25 June 1958 (or 'ILO 111'), which does not deal with age explicitly but which seeks to eliminate all forms of discrimination in employment

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- The *International Covenant on Civil and Political Rights* (or ICCPR) and the *International Covenant on Economic Social and Cultural Rights*, neither of which deal with age explicitly but both of which include anti-discrimination principles (contained in article 2 in both Covenants and article 26 of the ICCPR)
- *International Labour Organisation Recommendation No.162* concerning older workers (adopted by the General Conference of the International Labour Organization in 1980)
- In 1982 the United Nations General Assembly endorsed the *International Plan of Action on Ageing*
- In December 1991 the UN General Assembly adopted the United Nations *Principles for Older Persons*
- Leading up to the 10th anniversary of the *International Plan of Action on Ageing* in 1992, the United Nations General Assembly adopted the *Proclamation on Ageing*, and
- The UN declared 1999 the International Year of Older Persons.

An extensive discussion of the relevant international material is contained in *Age Matters*.<sup>35</sup>

The publicity around the introduction of the legislation highlighted, within a global context, the pioneering aspects of the legislation, with the Attorney-General commenting that:

[t]he development of comprehensive national age discrimination legislation that protects persons of all ages in a range of areas of public life puts Australia at the forefront of international initiatives to eliminate age discrimination.<sup>36</sup>

*The Age* commented that ‘Australia will be the first country to legislate against age discrimination across the board.’<sup>37</sup>

The European Union has an *Employment Framework Directive* which was passed in 2000 and obliges all EU member states to introduce age discrimination law by 2006. This means that the UK is investigating legislation, although according to Australia’s Attorney-General (in 2002) they are planning something ‘more limited in scope’ than that envisaged by the Australian plan.<sup>38</sup> The US, New Zealand, Canada and Ireland all have legislative provisions governing age discrimination, however they are all, apparently, more limited than those proposed for Australia.<sup>39</sup> The Explanatory Memorandum for this legislation concludes that ‘[t]he experience of other countries in implementing age discrimination legislation in relation to employment appears positive,’ with the UK Government’s study of the impact of such legislation concluding ‘[i]n total there are net benefits to the proposed legislation. Even considering employers only this is the case.’<sup>40</sup>

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There is also an interesting study conducted by Zmira Hornstein for the Joseph Rowntree Foundation called *Outlawing age discrimination: Foreign lessons, UK choices*, 2001. This study concludes (after a study of 13 countries, with a detailed look at three, including Australia) that the effect of age discrimination legislation is ‘in most cases weak.’ It concludes that ‘the effectiveness of the new legislation will also depend on the internal consistency of the legislation and the overall stance of Government policies to promote, monitor and enforce non-discriminatory behaviour.’<sup>41</sup>

## Main Provisions

### Introductory Provisions

**Proposed section 3** sets out the objects of the **proposed Act**, and it is interesting to note that as well as a blanket object of eliminating age discrimination in the areas dealt with under the legislation, the **proposed Act** targets age discrimination against the old as a problem area of particular concern. The objects also nominate an educative role to be undertaken, a role already legislatively provided for in the *Human Rights and Equal Opportunity Commission Act 1986* (or HREOC Act).

After the preliminary sections, including a simplified outline of the legislation, the definitions in **proposed section 5** include that of ‘administrative office’ which is essentially defined to cover appointments made under Commonwealth or Territory law. This definition is used later in the **proposed section** to clarify the definition of employment. The definition excludes members of any of the Territorial assemblies, ensuring that these politicians remain free from regulation under the age discrimination legislation. **Proposed section 5** also includes a definition of work which will cover a range of employees, including casual employees, and a definition of premises which covers various forms of transport (‘aircraft, vehicle or vessel’) which becomes important when the prohibition on discrimination in access to premises is made.

**Proposed section 6** defines age discrimination so that complaints of age discrimination must not overlap or become subsumed under any disability discrimination which may be present in a given situation. This provision requires that the *Disability Discrimination Act 1992* (or ‘the DDA’) covers all complaints of discrimination which deal with disability. Consequently a complaint of age discrimination which arises out of or could result in a complaint of disability discrimination must be dealt with under the DDA. However the provision does not preclude a further complaint of discrimination on the basis of age arising out of the same fact situation if there are in fact two different and distinct forms of discrimination occurring.

**Proposed section 9** stipulates, in summary, that the **proposed Act** applies throughout Australia and, where relevant and constitutionally possible, it will have an extraterritorial effect if there has been some discrimination within Australia that involves matters outside

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Australia. **Proposed section 10** invokes the wide range of constitutional powers under which the legislation may be found valid. Included amongst the range of constitutional heads of power available to the Commonwealth are those under the external affairs power. Under this head of power the proposed legislation invokes a range of international law instruments, including the foundational human rights instruments<sup>42</sup> and ILO 111.<sup>43</sup>

**Proposed section 11** provides the ‘constitutional safety net’ whereby any possible infringement of the principle that the Commonwealth must acquire property on just terms is dealt with by allowing the subject of such an infringement to take action in the Federal Court.

All States and Territories have legislation dealing with age discrimination, and in recognition of these regimes **proposed section 12** provides that the State and Territory regimes are to continue, but that no complaint of discrimination may be taken twice for adjudication under the parallel systems. A choice must be made at the stage of taking a complaint as to which legislation should form the basis of the complaint. Furthermore no-one may be liable to be punished twice with respect to the same act. The **proposed legislation** will also cover State and Territory government employees since it binds the Crown in right of the States (and of the Territories) (**proposed section 13**).

The format of **proposed sections 14 and 15**, which are designed to define direct and indirect discrimination, will be familiar from other anti-discrimination legislation. Direct discrimination is, as the phrase suggests, a form of discrimination which takes place when a person is treated less favourably because of the particular feature being dealt with, in this case, age. In these cases a decision not to employ someone because of their age would be a case of direct discrimination on the basis of that person's age. There are also situations where the features that those of a certain age share would be relevant to direct discrimination. For instance a decision not to employ someone because they had grey hair or because their face was marked with wrinkles or furrows (features common amongst those who are aged) would also be direct discrimination. Finally, making a decision on the basis of a characteristic that is generally imputed to belong to those of a certain age can also be direct discrimination.

Indirect discrimination (**proposed section 15**) occurs when a condition is imposed which is more difficult for people of a certain age to meet. So for instance, the requirement that employees meet certain rigorous fitness standards may be more difficult for those who are older (or indeed for those who are significantly younger). If it is assumed that those above a certain age will not be able to meet a certain fitness level and no testing of those above that age is allowed, then that would be direct discrimination. Setting the required fitness level higher than it need be may constitute indirect discrimination if those who are older cannot meet the standard. It is part of the definition of indirect discrimination that the condition is not ‘reasonable in the circumstances’. **Proposed subsection 15(2)** puts the burden of showing that the condition is reasonable in the circumstances on the person who is doing the discrimination. This occurs elsewhere in anti-discrimination legislation<sup>44</sup> and

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reflects the fact that the information needed to show what is reasonable in the circumstances is most easily accessible by the person imposing the conditions.

**Proposed section 16** is a departure from standard anti-discrimination law. It provides that if a discriminatory act takes place and there a number of reasons for the act then, in order for this to constitute age discrimination as defined by the legislation, the age of the person must be the ‘dominant reason’ for the act. It is standard in anti-discrimination legislation that if there are a number of reasons for a discriminatory act then it still constitutes the relevant form of discrimination if only an *element* of the decision was based on the particular form of discrimination concerned.<sup>45</sup>

#### Part 4 – Unlawful Age Discrimination

**Proposed Division 2 (of Part 4)** deals with discrimination in employment and related matters. It makes it illegal for an employer to discriminate against an employee on the basis of age with respect to who is employed, how they are employed (e.g. terms and conditions, training etc) and the termination of employment (**proposed section 18**). It is also illegal to discriminate in similar matters in the case of commission agents (**proposed section 19**), contract workers (**proposed section 20**), partnerships (**proposed section 21**) and employment agencies (**proposed section 24**). All these proposed sections include an exemption for the inherent requirements of a position. This exemption means it is not unlawful for the relevant person/body to discriminate against a person on the basis of their age if they can’t satisfy the inherent requirements of the position because of their age. In deciding whether or not someone can satisfy the inherent requirements of a position a decision maker is to consider a person’s training, qualifications and relevant experience, their performance in the position (if they are already in it), and all ‘other relevant factors’ that it may be reasonable to take into account.

**Proposed section 18** also contains an exemption for employment involving domestic duties on the premises at which the discriminator resides. The provisions relating to illegal discrimination in partnerships (**proposed section 21**) excludes partnership arrangements of less than 6 members.

Two of the proposed sections in this Division deal with discrimination by associations. One applies to ‘qualifying bodies’, who regulate a profession, trade or occupation. The standard prohibition on age discrimination and an exemption for the inherent requirements of a position apply (**proposed section 22**). The other forms of associations regulated in this Division are organisations registered under the *Workplace Relations Act 1996*, such as unions or employer bodies. **Proposed section 23** deals with these bodies and makes it illegal for them to discriminate on the grounds of age in accepting people for membership, the terms and conditions on which the organisation is prepared to admit the person to membership, or by allowing age to determine a member’s access to benefits or depriving the member of membership etc. There is no exemption based on the inherent requirements of a position for this prohibition.

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**Proposed section 25** provides a blanket exemption from the prohibition on age discrimination for youth wages (i.e. payment for people under 21). The exemption applies to discrimination on the ground of someone's age, in relation to youth wages, and applies to arrangements made about recruitment, about who should be offered work and in payment for work.

**Proposed Division 3 (of Part 4)** prohibits age discrimination in a number of areas other than work. The first prohibition applies to educational institutions, and prohibits all forms of age discrimination other than limiting access to an institution specifically established for students above a certain age. Thus a requirement that a student be under a certain age before enrolling in a particular course would be unlawful (**proposed section 26**).

**Proposed section 27** prohibits age discrimination in access to premises. Under the definition of premises used in the Bill it will cover transportation as well as stationary premises. Similarly **proposed section 28** deals with discrimination in the provision of goods, services or facilities.

The prohibition of age discrimination in the provision of accommodation (**proposed section 29**) is the subject of an exemption when the discriminator or a near relative resides (and will continue residing) on the premises. In these cases the accommodation provided must be for no more than 3 persons other than the discriminator and their near relatives. The prohibition of age discrimination in the sale, or in the terms and conditions on which the sale of an estate or interest in land is to be made (**proposed section 30**) is also the subject of an exemption in the case of wills or gifts.

While **proposed section 31** makes it illegal for people administering Commonwealth programs to discriminate on the basis of age this is the subject of a broad exemption later in the legislation.<sup>46</sup> Finally, asking questions of people if they are of a certain age can be illegal under **proposed section 32**. This provision is designed to prevent employers, for instance, from singling out people of certain ages for particular scrutiny and is designed to prevent further discrimination which may be consequent on the answer to such questions. The standard example given of a prohibited act would be an employer asking a job applicant over a certain age for additional information about their health and fitness when applicants of younger ages were not subject to the same questions.

## Division 4 – General Exemptions

There are a large number and range of exemptions provided for in the Bill. The first is a general exemption covering positive discrimination, that is discrimination which is meant to redress the effects of previous discrimination, or which is meant to benefit a particular group or which is meant to assist a particular age group who are needy (**proposed section 33**). The **proposed section** gives examples of when discrimination would be legitimate on these grounds, such as discounts for card holders (the criteria for which is age) or programs designed to assist people from certain age groups who need assistance more than

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people from other ages. Similarly charitable benefits are exempt from any requirement that they not discriminate on the basis of age (**proposed section 34**).

Religious and voluntary bodies are given certain exemptions from the prohibition on age discrimination. In the case of a religious body this is conditional on the behaviour conforming to the doctrines, tenets or beliefs of that religion, or being necessary to avoid injury to the religious sensitivities of adherents to that religion (**proposed section 35**). The Explanatory Memorandum indicates that both these conditions must be met to qualify for the exemption,<sup>47</sup> whereas in fact the Bill gives them as alternatives. A voluntary body is defined so as to exclude trade unions, employer bodies and financial institutions (**proposed section 36**). The exemption given to voluntary bodies is given to a limited range of behaviours, including who is entitled to membership and the services offered to members. As an employer, a voluntary body would still be subject to the prohibition on age discrimination.

The exemptions given to superannuation and insurance in **proposed section 37** have a certain internal logic, given it is often in the nature of the provision of these facilities that they rely on age in some way. The exemption is allowed when actuarial or statistical data is being relied on as the basis for the discriminatory behaviour and that data is being used in a reasonable manner. It is also allowed when there is no actuarial or statistical data available (and it cannot be easily obtained) but the discrimination is reasonable 'having regard to any other relevant factors.' It is not immediately apparent what these other relevant factors will be. The exemption given for credit in the same **proposed section** allows age discrimination in the provision of, or the conditions attached to the provision of, credit when it is based on reasonable use of actuarial or statistical data. In all these circumstances HREOC and its President can require the actuarial or statistical data to be shown to them (**proposed section 54**). **Proposed section 38** provides that acts done in compliance with Commonwealth Acts or Regulations regarding superannuation cannot constitute a prohibited form of age discrimination. Other subject areas in which Commonwealth legislative regulation is made exempt from the operation of the proposed age discrimination provisions are taxation (**proposed section 40**) and migration and citizenship (**proposed section 43**). The age based discrimination which exists in the field of migration and citizenship is explained in the Explanatory Memorandum as being part of the need to balance 'social, economic, humanitarian and environmental factors' to achieve outcomes of benefit to the Australian community as a whole.<sup>48</sup> Furthermore, says the Explanatory Memorandum, given the level of parliamentary and public scrutiny of migration laws and regulations, and their general importance, it is 'appropriate that these laws are exempted from the application of this Act.'<sup>49</sup> The provisions governing the *Migration Act 1958* and the *Immigration (Guardianship of Children) Act 1946* in **proposed subsection 43(1)** give a broader exemption than the next **proposed subsection**. **Proposed subsection 43(1)** applies to *anything* done when administering those Acts. This could include behaviour or decisions which manifest age discrimination not mandated or prescribed in the Acts themselves. The provisions governing the *Australian Citizenship*

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*Act 1948* and the *Immigration (Education) Act 1971* (**proposed subsection 43(2)**) only exempt discriminatory behaviour that is necessary for direct compliance with the Acts.

Rather than a blanket exemption for acts done in accordance with Commonwealth laws **proposed section 39** has a more complex arrangement. The specific subject areas mentioned above (as defined by legislation (in *some* cases)) are given an exemption and then **proposed section 39** gives an exemption to a broad range of individual Acts and Regulations in **proposed Schedule 1** of the Bill. For Commonwealth legislation not covered by these provisions there is a period of 2 years during which discriminatory provisions are exempted and in this time they will be identified and it will be determined how to deal with them - the alternatives being amendment or seeking exemptions as offered by HREOC (it is unclear what will become of any legislation that might slip through this process, which remains discriminatory, unaddressed and, being un-scheduled, is not subject to the exemption from compliance with the provisions of this legislation). **Proposed sub-sections 39(4)** and **(7)** exempt acts done in compliance with State and Territory laws and court orders respectively. There is also an exemption for orders or awards as to minimum wages, certified agreements and Australian workplace agreements (**proposed sub-section 39(8)**). Discriminatory acts done under a wide range of legislatively based, pensions, allowances and benefits are given an exemption, along with the CDEP Scheme (administered by the Aboriginal and Torres Strait Islander Services).

**Proposed section 42** deals with exemptions for health programs which make distinctions between people on an age basis where those distinctions are based on evidence about the 'safety, effectiveness, risks, benefits and health needs' of particular ages. The exemptions apply to both health programs and individual decisions about the provision of medical goods or services. So, for instance, a decision not to provide access to a liver transplant on the grounds of a person's age would probably not constitute age discrimination under this legislation.

**Proposed sections 44-47** provide for the Commission to make exemptions under the proposed Act. These exemptions can be made in response to an application and can be appealed to the Administrative Appeals Tribunal. The exemptions can be made on particular terms and conditions and can last for a period not exceeding 5 years (although they can be renewed upon further application). The sex and disability discrimination legislation have similar provisions for exemptions to be made by the Commission.

## Part 5 - Offences

There are a limited number of provisions which are criminal offences under the **proposed Act** and those that are criminal in nature (rather than simply illegal) are found in this Part (**proposed Part 5**) and in **proposed section 60**. Complaints of unlawful behaviour can be made to the Commission although if one or both of the parties refuse to comply with the Commission's findings a case must be taken to the Federal Court. **Proposed section 49** provides that the standard rules applying to corporate criminal responsibility do not apply

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to the provisions of the **proposed Act** but instead there is an arrangement made for corporate responsibility in **proposed section 57**.

There are three offences created under this part:

- **Proposed section 50** makes it an offence to display advertisements or notices indicating (or which could be reasonably understood to indicate) an intention to discriminate on the basis of age (to the extent such discrimination is made illegal under the **proposed Act**).
- **Proposed section 51** makes it an offence to victimise someone because they complain of age discrimination under the legislation (or the offender thinks that they might do so under the *Human Rights and Equal Opportunity Commission Act 1986* (or the HREOC Act)). Equally it would be an offence to victimise someone on the basis that they would support someone else in making such a complaint or would provide information about someone else's rights (or their own) under the HREOC Act. *Threats* to victimise for the same reasons are also an offence under **proposed sub-section 51(2)**, whether the threats are express or implied (**proposed sub-section 51(3)**) and whether they are believed or not (**proposed sub-section 51(4)**).
- **Proposed section 52** makes it an offence to refuse to provide the President of the Commission or the Commission itself with the source of actuarial or statistical data (data which may be relied on to justify age discrimination under various exemptions, e.g. superannuation) within 28 days after it has been requested. While this is an offence of strict liability a defendant can attempt to establish a reasonable excuse (**proposed subsection(2)**). The standard approach to offences of this sort is to regard each day of the continued failure as a further offence,<sup>50</sup> however this approach is not applied by **proposed subsection (4)**. It is **proposed section 54** which gives the Commission the power to request the source of the actuarial or statistical data on which a body is relying to justify discriminatory acts.

It is noted that the first two offences would also constitute unlawful discrimination under the HREOC Act and a complaint could be made to the Commission.

## Final Parts

**Proposed section 53** confers a number of functions on the Commission. These functions include promoting the principles of the **proposed Act**, research and education in the area of age discrimination, examining legislation and proposed legislation to see if it is consistent with the principles of anti-discrimination with respect to age, making recommendations for laws or actions to be made or taken by the Commonwealth and publishing guidelines on how to avoid age discrimination. The Commission already has many of these powers under its general human rights jurisdiction contained in HREOC Act section 11 (and sections 20 and 31). As well as the pre-existing international human rights instruments, the combined effect

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of scheduling the International Labour Organisation's *Discrimination (Employment and Occupation) Convention 1958* (ILO 111) and the making of the Human Rights and Equal Opportunity Regulations 1989 which declared age as a matter of concern to the Australian Government gives the Commission the capacity to exercise a variety of promotional and educative functions in seeking the elimination of age discrimination in employment. Finally the Commission is given the function of seeking leave to intervene in cases where there is age discrimination. It should be noted that the Australian Human Rights Commission Legislation Bill 2003 currently before the Parliament seeks to curtail this function in all other anti-discrimination legislation, requiring the Commission to seek the permission of the Attorney-General before intervening in cases.

**Proposed section 55** provides for the Commission to delegate its powers to a Commission member or staff member or 'another person or body of persons' (**proposed subsection 55(c)**). The Scrutiny of Bills Committee has included this provision in its Alert Digest commenting that the Committee would expect to see a limit set on provisions which give a statutory body the unfettered discretion to delegate 'all or any of its powers to anyone at all.'<sup>51</sup> Without such a limit they would regard this as an 'insufficiently defined administrative [power]' which would breach their terms of reference. The Committee is awaiting advice from the Attorney-General at the date of writing.

**Proposed sections 56 and 57** deal with questions of agency. So someone who 'causes, instructs, induces, aids or permits' someone else to do a discriminatory act is taken to have also done it (**proposed section 56**) and **proposed section 57** deals with the liability and requisite state of mind of body corporates or employers or people acting through an agent. There are exceptions for liability for discriminatory acts made in cases where a body corporate can show they took reasonable precautions and exercised due diligence to avoid the conduct occurring, and the vicarious liability covered by this section is excluded from forming the basis of imprisonment should such an indirect offence have occurred.

**Proposed section 58** protects members of the Commission and their agents against actions for acts done in good faith under the powers and functions given by the proposed Act. It also protects third parties from actions that might be taken on the basis of loss suffered when that third party has provided information or evidence or has made submissions or given documents or information to the Commission.

**Proposed section 60** creates an offence with a significant possible penalty (2 years) for violating certain privacy principles with respect to information provided to the Commission under the provisions of the **proposed legislation**. So, for instance, making a record of, or communicating the information to another person will be an offence although there are defences such as the disclosure being for the purposes of the **proposed Act**. The burden of proving these defences would lie with a defendant in such a case. **Proposed subsection 60 (2)** also prohibits courts from requiring someone with such information to produce it.

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Finally **proposed section 61** provides a broad power for the making of regulations under the **proposed Act**.

## Concluding Comments

### The Immigration Exemption

One of the potentially controversial exemptions is that given in the area of migration. The Explanatory Memorandum says

Immigration policies are intended to balance social, economic, humanitarian and environmental factors in order to achieve migration outcomes of benefit to the Australian community as a whole. An integral component of setting the migration program is to balance the costs of the migration program as a whole, including the pressure on national resources, against the contribution of a particular age group during stay or settlement in Australia. There would be costs to government if these legitimate policy aims were compromised by compliance with a prohibition on age discrimination.<sup>52</sup>

It goes on to argue that another reason why the broad exemption is justified is that ‘there is considerable parliamentary and public scrutiny given to migration laws and regulations’.

HREOC has commented with respect to such an exemption:

To the extent that [the provisions] exempt not only acts done in direct compliance with a law but also discretionary acts not mandated by law, then the Commission expressly disagrees with that aspect of the proposal. Inclusion of discretionary acts in the exemption would be inconsistent with the general thrust of the proposals made in the [Attorney-General’s Issues Paper] in relation to Commonwealth laws and programs as it would have the potential to remove all action taken under the *Migration Act* and its regulations, that is, both those acts done in order to comply with a law and those discretionary acts done to administer the law. In addition, as outlined under 6.3 of [that Issues Paper], discretionary acts could be permitted if they met the tests set out in other exceptions, such as the proposed exception for positive discrimination.<sup>53</sup>

The Parent visa classes are one of the major avenues of admission into Australia for older people. In their restricted availability they arguably illustrate a form of age discrimination in Australia’s immigration system which has attracted some scrutiny. These visas have been subject to strict annual caps of around 500 p.a. (although this has just been increased for 2003-04 to 1 500 and thereafter to 1 000 p.a.). The capping system is not applied across all visa classes and the end effect of these caps is some potentially lengthy waiting periods (of up to 44 years).<sup>54</sup>

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From 1989 to 2000, the number of migrants settling in Australia dropped 37% from 145 316 to 92 272.<sup>55</sup> Over the same time frame those aged 60+ dropped 73% from 7 828 to 2 943, a considerably larger percentage drop. These figures indicate that policies involving discrimination on the basis of age in migration policy are having an impact.

*The West Australian* commented on this exemption that:

the Government [would retain] the right to reject applicants for immigration visas on the grounds that they are too old. Harsh though that may seem, most Australians would probably support the exemption on the assumption that older migrants cost more and contribute less to the community than younger ones.<sup>56</sup>

With respect to the ‘skilled migrant’ visa class *The Age* comments that ‘when Australia is facing a skills shortage, it makes little sense to retain the ban on skilled migrants older than 45,’<sup>57</sup> while a submission to HREOC’s Age Matters enquiry comments ‘[t]he assumption that just because a person is over 45 years old they will have difficulty finding work may result in Australia missing out on the skilled and valuable labour of many people aged over 45 years old.’<sup>58</sup> On this matter the NSW Young Lawyers Human Rights Committee also comments:

The government should be setting the standards in the Australian economy so that age is not seen as a determinative factor in a worker’s contribution. The government should be consistent: if age discrimination is not tolerated in Australia (as per international conventions) how can it be tolerated in the migration program?<sup>59</sup>

## Conclusion

*The West Australian* used an interesting title to an editorial about this proposed legislation: ‘Shades of grey in ageism laws.’<sup>60</sup> It seems likely that age, as a ground of discrimination, will be the most conditional of the prohibited grounds of discrimination. The range of exemptions is broad, and includes areas where most people would agree there *should* be distinctions made on age, for example in superannuation, or for age related health programs. The fact that age provides some sort of guide to development through the human stages of life means that it can be a useful tool for social organisation, even if it is a blunt instrument. So, for instance, the age at which one can acquire a driver’s licence may not be a perfect marker for competence, and there may be other more reliable methods of testing for the necessary qualities, however in the absence of the resources or the will to embark on this larger exercise, age may signify some statistical tendency to a certain level of maturity. The ACCI comment with respect to using age as a criteria in employment decisions ‘age is a reasonable proxy for the attributes of skill, maturity, work attitude and experience.’<sup>61</sup>

The Council of the Ageing, with perhaps a clearer insight into the damage caused by inappropriate age discrimination, are robustly supportive of the need for strong age

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discrimination legislation with limited exemptions. On the topic of keeping exemptions to a minimum they quote a UK commentary with an interesting perspective:

The action of government departments in tackling age discrimination themselves will be an important part of the tone and approach of Government. If government departments are perceived to be reluctant in their approach, and/or arguing for exemptions, this is likely to impede the effectiveness of measures designed to combat discrimination in employment and health and social care. The government will need to be seen as leading by example.<sup>62</sup>

The Council of the Ageing is also concerned that a 'whole of government approach is needed to address age discrimination.'<sup>63</sup>

These issues cross-cut portfolios. To successfully address structural barriers (to age discrimination) the restrictive boundaries of individual portfolios must be overcome.<sup>64</sup>

This reflects research by Professor Sol Encel, of the University of New South Wales' Social Policy Research Centre, which suggests countries trying to address age discrimination are concluding that age discrimination legislation is important but not sufficient in itself to prevent discrimination against older workers.<sup>65</sup> The need to put age discrimination legislation in a broader context does not, however, deny that it can play a useful role, not just in the handling of complaints but also as an educative exercise.

Presumably the Prime Minister was referring to this need to look at the broad picture when he recently spoke at the Symposium on Mature Age Employment in Sydney. He said that:

...the question of an ageless workforce is not primarily an issue of discrimination. It is primarily an issue of investing in our country's future. To look at the notion of an ageless workforce in terms of anti-discrimination is I think to demean what is at stake and also to invest the debate with far too narrow a legalistic approach.<sup>66</sup>

While Mr Howard's speech contained no reference to the legislation before the House at the time he did suggest that:

[i]t is not [the Government's] responsibility, and we certainly don't intend to do so, to mandate individual behaviour by particular firms and by particular companies.<sup>67</sup>

While the legislation clearly does not specify any particular action which must be taken by employers it does specify actions which must not be taken. Furthermore the prohibition on age discrimination contained in the legislation could form the basis of a finding by the Courts as to how particular firms and companies should behave.

The spirit of the legislation also sits oddly with the Prime Minister's assertion (when speaking of the interplay between employer and employees of different ages) that:

we must also recognise that one of the areas of contribution must come from the mature aged workers themselves ... And that will increasingly, for example, mean that

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if people wish to remain beyond what are now regarded as customary retirement ages, there must be a greater willingness to be involved in part-time and contract work and the corresponding flexibility in relation to remuneration arrangements.<sup>68</sup>

The prospect that the age discrimination legislation could form a prelude to a requirement that workers stay in the workforce for longer would not sit comfortably with many people. The *Mercury* has certainly raised the spectre that:

Older Australians are entitled to feel uneasy about the string of hints from Canberra concerning plans to lift the retirement age.<sup>69</sup>

Given all the States and Territories already have some form of age discrimination legislation the final thing that could be noted about this proposed Commonwealth legislation is that it might not be used as the preferred vehicle of complaints of discrimination given that age must be the dominant reason for discrimination before it can form the basis of a complaint. This has been described by a prominent law firm as ‘a significant hurdle for complainants and a major weakness in the Bill.’<sup>70</sup>

## Endnotes

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- 1 Keating, PJ, Speech ALP campaign launch, Melbourne, 14 February 1996.
- 2 *National Action Plan: Australia, 1995 Update*, 30/8/96, p. 40.
- 3 This paragraph and the next derive from information in *Age Matters: A Report on Age Discrimination*, Human Rights and Equal Opportunity Commission, May 2000, p. 107.
- 4 Attorney-General, Mr Williams, Second Reading Speech, House of Representatives, *Official Hansard*, 26 June 2003, p. 17622; Explanatory Memorandum, p. 2. The commitment was made in the Government’s election statement *Better Law More Options*.
- 5 Simon Kearney, *The Sunday Telegraph*, Sunday 19 May 2002.
- 6 ‘Shades of grey in ageism laws, *The West Australian*, Mon 13 Jan 2003.
- 7 *ibid.*
- 8 ‘Skills too valuable to waste,’ *The Age*, Mon 13 Jan 2003.
- 9 ‘Anti-age laws could discriminate against majority: ACCI’, Sun 13 April 2003, AAP.
- 10 These concerns are taken from the Council of the Ageing’s Submission on the Proposed Introduction of Federal Age Discrimination Legislation given to the Select Committee on Superannuation and reproduced at Appendix Five of the Committee’s Report *Planning for Retirement*, July 2003, p. 189. The Council of the Ageing’s full submission on the proposed legislation can be found at [www.cota.org.au](http://www.cota.org.au).

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- 11 *Response to Information Paper Containing Proposals for Commonwealth Age Discrimination Legislation, December 2002*, HREOC, 12 February 2003.
- 12 There were others which are contained in the paper which is available on-line at [http://www.hreoc.gov.au/legal/age\\_discrimination\\_legislation.html](http://www.hreoc.gov.au/legal/age_discrimination_legislation.html).
- 13 For instance the objects included in **proposed subsection 3(e)** make direct reference to concerns about older people and there is no corresponding exclusive focus on the young.
- 14 ‘Workers who’ve been forgotten’, Rebekah Devlin, *The Advertiser*, Thurs 23 Jan 2003.
- 15 *ibid.*, It could be noted that of those 30 there were only another 6 who were specifically focussed on older people. The final 20 covered a wide range of issues which should mostly have been of general interest to both ends of the age spectrum.
- 16 *Age Matters*, p. 114.
- 17 Quoted in ‘Workers who’ve been forgotten’, Rebekah Devlin, *The Advertiser*, Thurs 23 Jan 2003.
- 18 See, for example, ‘Shadow Minister defends Labor Party's policy on junior wages’, Transcript of Interview, AM, 25 August 1999.
- 19 ‘Labor will again abolish youth wages’, *Press Release*, The Hon Peter Reith MP, 11 July 2000; see also ‘Confirmed: Labor’s plan to abolish youth wages’, *Press Release*, The Hon Peter Reith MP, 17 August 2000.
- 20 *Age Matters*, p. 115.
- 21 The accompanying press release also commented:  
 As the demographic changes are expected to be the greatest and most rapid in developing countries, where the older population is expected to quadruple by 2050, the Assembly recognized the importance of placing ageing in the context of strategies for the eradication of poverty, as well as efforts to achieve full participation of all developing countries in the world economy. The texts promoted a new recognition that ageing was not simply an issue of social security and welfare but of overall development and economic policy. They also stressed the need to promote a positive approach to ageing and overcome the negative stereotypes associated with it. ‘Building a society for all ages’ Second World Assembly on Ageing Madrid, Spain 8-12 April 2002, SOC/M/22, 12 April 2002.
- 22 Explanatory Memorandum, p. 8.
- 23 *ibid.*, p. 9.
- 24 Quoted in ‘Older workers fall out of favour’, David Potter, *Courier Mail*, Sat 26 April 2003, p. 14.
- 25 The Nelson Report.
- 26 Quoted in the Senate Select Committee on Superannuation Report *Planning for Retirement*, July 2003, p. 28.
- 27 *Age discrimination is alive and well* (1999)
- 28 As quoted in *Age Matters*, p. 12.

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- 29 As quoted in ‘Life ends at 40’, Bill Simpson, *The Courier-Mail*, Sat 24 May 2003.
- 30 ‘Old problems: CEDOs hit the grey ceiling,’ Michael Cave, *Australian Financial Review*, Sat 26 July 2003, p. 6.
- 31 *ibid.*
- 32 ‘Older workers soon to have their day in the sun,’ Carol Nader, *The Age*, Mon 14 Oct 2002.
- 33 See: <http://www.un.org/esa/socdev/ageing/waa/>.
- 34 Under an instrument of declaration made 22 December 1992 the Attorney-General of the Commonwealth declared that the Convention was an international instrument relating to human rights and freedoms for the purpose of the *Human Rights and Equal Opportunities Commission Act 1986*.
- 35 Australia’s international undertakings on age discrimination, Chapter 5, p. 89.
- 36 ‘Significant steps toward a Commonwealth Age Discrimination Act,’ the Hon Daryl Williams AM QC MP, *Reform*, 81, 2002, p. 17. See also ‘Australia leads world with Age Legislation,’ *Press Release*, Attorney-General the Hon Daryl Williams AM QC MP, 26 June 2003.
- 37 ‘Law to stop bias against old workers,’ Tim Colebatch, *The Age*, Fri 10 Jan 2003.
- 38 ‘Significant steps toward a Commonwealth Age Discrimination Act,’ the Hon Daryl Williams AM QC MP, *Reform*, 81, 2002, p. 17.
- 39 So, for example, the US provisions are limited to employment issues and persons who are between 40 and 65 and New Zealand’s laws do not apply to age discrimination against children. *Ibid.*
- 40 Explanatory Memorandum, p. 21, quoting the United Kingdom’s Department of Trade and Industry ‘Detailed Regulation Impact Assessment (DRIA)’ of implementation of the EU Employment Directive (available at <http://www.dti.gov.uk/er/equality/ria.pdf>).
- 41 ‘Age Discrimination Legislation: Choices for the UK’, July 2001, Ref 711. These quotes are from the summary provided at <http://www.jrf.org.uk/knowledge/findings/socialpolicy/711.asp> The Joseph Rowntree Foundation is one of the largest independent social policy research and development charities in the UK.
- 42 These include the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights*.
- 43 **Proposed section 10** mentions that ILO 111 can be found as Schedule 1 to the *Human Rights and Equal Opportunity Commission Act 1986*. Surprisingly it does not make any explicit reference to the fact that, given that Article 1.1(b) of this instrument permits a State Party to add grounds unilaterally for its own domestic purposes, Australia added age as one of these grounds in the Human Rights and Equal Opportunity Commission Regulations 1989. The Explanatory Memorandum makes reference to this fact and also points out that as a result of ILO 111 Australia has international obligations to promote equality of opportunity and treatment in employment with a view to eliminating discrimination on the ground of age.
- 44 *Sex Discrimination Act (1984)*, s. 7C.

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45 For example, *Race Discrimination Act (1975)*, s. 18; *Sex Discrimination Act (1984)*, s. 8; *Disability Discrimination Act 1992*, s. 10; and at a State/Territory level there is the *Anti-Discrimination Act 1977 (NSW)*, s. 4A; *Anti-Discrimination Act 1998 (Tas)*, s. 14.

46 **Proposed section 39.**

47 Explanatory Memorandum, para 91, p. 51.

48 Explanatory Memorandum, para 124, p. 56.

49 *ibid.*

50 Subsection 4K(2) *Crimes Act 1914*.

51 Alert Digest No. 8 of 2003, 13 August 2003, p. 6.

52 Explanatory Memorandum, p. 14.

53 Response to Information Paper Containing Proposals for Commonwealth Age Discrimination Legislation, December 2002, Human Rights and Equal Opportunity Commission, 12 February 2003, section 6.1.

54 As at the end of June 2002 there were 21 920 applications for these two visa classes. Under this system, with an annual cap of 500 p.a., those at the end of the queue would be waiting almost 44 years to eligible for a parent visa. Under the new system allowing for 1 000 per year, those at the end of the queue would be waiting almost 22 years, assuming none were removed from the queue for some reason.

[Managing the Migration Program](http://www.dimia.gov.au/facts/21managing.htm) (<http://www.dimia.gov.au/facts/21managing.htm>): As of the end of June 2002, there were about 16 380 people in the offshore Parent visa subclass 103 pipeline, out of which about 9 050 people were queued. Onshore, the subclass 804 pipeline included about 5 540 persons of which about 3 150 were queued.

As at 1 July 2002, applicants for a subclass 103 Parent visa with a queue date on or before 28 January 1999 are eligible to be processed for a visa grant in 2002-03. The equivalent queue date for subclass 804 Aged-Parent visa is 4 November 1999.

It should be noted there is now a new visa category 'Contributory Parent Visa' which requires applicants for the new visa to pay somewhere in the vicinity of \$35 000 to get a permanent visa which provides an Assurance of Support to help cover any social security costs in the first 10 years of residence.

55 Figures extracted from: 'Permanent Movements By Age', DIMIA, *Australian Immigration Consolidated Statistics*, No. 21, 1989-2000, Released June 2002, p. 11.

56 'Shades of grey in ageism laws, *The West Australian*, Mon 13 Jan 2003.

57 'Skills too valuable to waste', *The Age*, Mon 13 Jan 2003.

58 *Age Matters*, p. 77.

59 *ibid.*, p. 78.

60 'Shades of grey in ageism laws, *The West Australian*, Mon 13 Jan 2003.

61 *Age Matters*, p. 57.

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- 62 *Age Discrimination Policy Position Paper*, Age Concern England. September 2002, p. 9. Quoted in the Council of the Ageing's 'Submission on the Proposed Introduction of Federal Age Discrimination Legislation' to the Select Committee on Superannuation and reproduced at Appendix Five of the Committee's Report *Planning for Retirement*, July 2003, p. 189.
- 63 *ibid.*, p. 190.
- 64 *ibid.*, quoting the conclusion of the Victorian, South Australian and Western Australian Equal Opportunity Commissions and the Australian Employers Convention, in *Age: Limits age-related discrimination in employment affecting workers over 45*. March 2001, p. 23.
- 65 See both 'Older workers fall out of favour', David Potter, *Courier Mail*, Sat 26 April 2003, p. 14; and Encel, Sol (2000). "Later-life employment." *Journal of Aging & Social Policy* 11(4): 7(7); and Encel, Sol (2003). *Age Can Work: The Case for Older Australians Staying in the Workforce: Mature-Age Workers and Labour Force Participation*. Sydney, ACTU and BCA.
- 66 Transcript of the Prime Minister the Hon John Howard MP Address to Symposium on Mature Age Employment Luncheon, Sydney Convention Centre, Sydney, 27 August 2003.
- Mr Howard went on a bit later to make this point again:
- There is I believe a growing belief in the community that the quality of somebody's contribution to the workforce is measured only by individual ability, rather than age or any other categorisation. And this is not as I repeat just in terms of the rather narrow legalistic approach of an anti-discrimination attitude, there is a growing realisation in our nation that as our population ages and because of advances in medical science people live longer and as the number of people entering the workforce as a proportion, entering the workforce for the first time dwindles and the inter-generational report produced by the Federal Treasury with last year's Budget provided a much needed factual basis to contribute to the debate. There is a growing realisation in our nation, within the Government, within the business community, that we do need to husband the resource of the mature age worker to whatever limit the individual capacities of those workers will permit.
- 67 *ibid.*
- 68 *ibid.*, See also: 'This man in his 60s has a full-time job,' *Sydney Morning Herald*, Saturday 7 June 2003, p. 37 .
- 69 'In bind over retirement,' *Mercury*, Thursday 13 March 2003, p. 14.
- 70 'Age Discrimination Stop Press,' *Blake Dawson Waldron*, July 2003.

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