

**A COMPROMISED BALANCE?
A COMPARATIVE EXAMINATION OF EXCEPTIONS
TO AGE DISCRIMINATION LAW IN AUSTRALIA
AND THE UK**

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Exceptions to discrimination law reveal both tensions and telling compromises regarding the boundaries of the equality principle. Drawing on case studies of exceptions to age discrimination law in Australia and the UK, this article considers the normative position on age equality law that emerges from these legal boundaries. It argues that broad exceptions to age discrimination law reflect a deprioritising of age equality, and a preference for the instrumental or economic aims underlying age equality law. The restrictive boundaries of age discrimination law risk undermining the effectiveness of equality law in practice.

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I INTRODUCTION

Discrimination legislation represents a negotiated compromise between the progressive potential of equality law and the established status quo.¹ This compromise is particularly evident in the exceptions allowed to discrimination law; permitting certain areas or behaviours to be immune from the strictures of equality law presents a strong stance regarding the normative limits of equality. Thus, exceptions to equality law reveal both tensions and telling compromises regarding the boundaries of equality and equal treatment.

In age discrimination law, these tensions and compromises are particularly fraught. Age discrimination is typically seen as less socially problematic than other forms of discrimination,² and is regarded as socially acceptable or justified in a wide variety of scenarios.³ Age is still regarded as a relevant principle for social ordering, meaning it is taken into account in a wide range of social and economic decisions. Thus, age discrimination can be instrumentally useful in a variety of settings, reflecting the ‘double bind’ between the instrumental and intrinsic purposes of age discrimination law.⁴ This fraught compromise inherent in age discrimination law is reflected in the broad exceptions typically allowed to the principle of age equality. Thus, age discrimination law represents a key case study for exploring the role of exceptions in navigating tensions in equality law.

In this article, I consider the role of exceptions in negotiating the tensions of equality law, focusing on age discrimination law in particular. Drawing on case studies of exceptions to age discrimination law in Australia and the UK, I consider the normative position on age equality that emerges from these legal boundaries. Australia and the UK both face significant demographic change in the coming years, with populations that are ‘ageing rapidly’.⁵ This will have

¹ Going further, Barmes argues that law (and individual rights at work) ‘simultaneously ... challenge and ... sustain the status quo’: Lizzie Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford University Press, 2016) 2.

² Malcolm Sargeant, ‘Mandatory Retirement Age and Age Discrimination’ (2004) 26 *Employee Relations* 151, 154.

³ See Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 198.

⁴ Hendrickx sees this as a tension between individual and collective interests: Frank Hendrickx, ‘Age and European Employment Discrimination Law’ in Frank Hendrickx (ed), *Active Ageing and Labour Law: Contributions in Honour of Professor Roger Blanpain* (Intersentia, 2012) 3, 21.

⁵ Select Committee on Public Service and Demographic Change, *Ready for Ageing?* (House of Lords Paper No 140, Session 2012–13, 14 March 2013) 7. See also Treasury, Australian Government, *2015 Intergenerational Report: Australia in 2055* (Report, March 2015) 13–14.

significant consequences for the sustainability of labour markets and social security systems in both countries, flagging the instrumental need for age discrimination laws to lift employment rates for older workers.⁶ Indeed, in 2016, the Australian Human Rights Commission described age discrimination against older workers as ‘systemic’ and ‘a significant barrier to workforce participation.’⁷ Beyond a shared experience of demographic ageing, Australia and the UK share a common legal tradition, and have both framed their equality law on an individual rights model. Indeed, Australian discrimination law was originally based on that of the UK.⁸ At the same time, there are still significant differences to the exceptions integrated in the national legal frameworks, reflecting different national normative decisions about the boundaries of age equality law. Thus, the countries are useful comparators for an exploration of the normative consequences of exceptions to equality law.

While previous studies have undertaken comparative analysis of the situation in Australia and the UK,⁹ this study extends existing research by conducting a detailed comparative legal doctrinal analysis of exceptions within the two regimes. Though age discrimination may occur across society, my focus here is particularly on age discrimination in employment. Given the potential economic value and individual significance of extending working lives, the field of employment represents a key challenge and focus for equality law. Thus, it is a key site for contests regarding the appropriate boundaries of discrimination law. Drawing on this comparative analysis, I argue that the broad exceptions to age discrimination law in both jurisdictions reflect a deprioritising of age equality, and a preference for the instrumental or economic aims underlying age equality law. I argue that the

⁶ See Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (Report, 2 May 2016) 11.

⁷ *Ibid.* 6. The Australian Human Rights Commission’s report into age discrimination in employment did not consider exceptions to age discrimination law.

⁸ See Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 1. For discussion of the influence of UK ageing developments on Australia, see generally Katherine Lindsay, ‘“Cradle to Grave”: Age Discrimination and Legislative Policy in Australia’ (1996) 3 *Australian Journal of Human Rights* 97, 111–15.

⁹ See, eg, Philip Taylor, Margaret Steinberg and Linda Walley, ‘Mature Age Employment: Recent Developments in Public Policy in Australia and the UK’ (2000) 19 *Australasian Journal on Ageing* 125; Kathleen Riach, ‘Older Workers: Learning from Three International Experiences’ (2006) 5 *Social Policy and Society* 551; Susan Bisom-Rapp, Andrew Frazer and Malcolm Sargeant, ‘Decent Work, Older Workers and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom, and the United States’ (2011) 15 *Employee Rights and Employment Policy Journal* 43.

restrictive boundaries of age discrimination law risk undermining the effectiveness of equality law in practice.

II EXCEPTIONS TO DISCRIMINATION LAW

Exceptions to discrimination law represent a negotiated compromise regarding the boundaries of equality law and its progressive potential. For Eastael, Cheung and Priest, '[a]ll anti-discrimination acts have been controversial to some extent and have necessitated compromises to be enacted'.¹⁰ Exceptions are a tool to enact these compromises.¹¹

At a basic level, exceptions may be seen as a concession to the status quo; or perhaps a concession to interest-group lobbying. For Thornton, vested interests are reflected in the text of discrimination statutes, showing a 'deference to conservative community values'.¹² In the UK, Dickens and Sargeant both argue that business lobbying has led to a number of "'business-friendly" concessions' in implementing EU law in the UK¹³ — including in the introduction of a national default retirement age in 2006.¹⁴ As exceptions are a core means of drawing the boundaries for equality law, they understandably also represent a key battleground for equality law. For example, in the passing of the *Equal Opportunity Act 2010* (Vic), exceptions for religious discrimination in Victoria were widened,¹⁵ despite other measures being introduced into the Act to progressively realise equality.¹⁶

While exceptions might be attributable to vested interests and lobbying, they also likely reflect a normative determination that certain areas or groups

¹⁰ Patricia Eastael, Channy Hiu Tung Cheung and Susan Priest, 'Too Many Candles on the Birthday Cake: Age Discrimination, Work and the Law' (2007) 7 *Queensland University of Technology Law and Justice Journal* 93, 99.

¹¹ *Ibid.*

¹² Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 *Journal of Law and Society* 448, 453–4.

¹³ Linda Dickens, 'Re-Regulation for Gender Equality: From "Either/Or" to "Both"' (2006) 37 *Industrial Relations Journal* 299, 306; Malcolm Sargeant, 'The Employment Equality (Age) Regulations 2006: A Legitimisation of Age Discrimination in Employment' (2006) 35 *Industrial Law Journal* 209, 224; Linda Dickens, 'The Road Is Long: Thirty Years of Equality Legislation in Britain' (2007) 45 *British Journal of Industrial Relations* 463, 470.

¹⁴ Sargeant, 'The Employment Equality (Age) Regulations 2006' (n 13) 224–7. This was ultimately removed in 2011.

¹⁵ Dominique Allen, 'Equal Opportunity: Unfinished Business' (2011) 36 *Alternative Law Journal* 273, 273. See also Margaret Thornton, 'Excepting Equality in the Victorian Equal Opportunity Act' (2010) 23 *Australian Journal of Labour Law* 240, 244–6.

¹⁶ *Equal Opportunity Act 2010* (Vic) pt 4.

should not be subject to equality law's progressive potential: equality law has certain, predefined limits. Excluding certain behaviour or groups from equality law therefore reflects a normative judgment as to the acceptable limits of equality law, and draws the line between normatively acceptable and unacceptable discrimination.¹⁷ For Thornton, exceptions illustrate 'contemporary resistance to state regulation of the market', and become 'almost schizophrenic' in trying to decide the line between acceptable and unacceptable discrimination.¹⁸ Thus, these normative judgments are far from clear-cut, and different statutory exceptions may prove to be inconsistent or contradictory in practice.

To some extent, exceptions may assist with securing the workability of discrimination statutes. For Smith, exceptions to equality law help to 'prevent absurdities',¹⁹ particularly where (as in Australia) there is no general justification defence to the general principle of equality.²⁰ In Australia, the 'patchwork' of exceptions to equality law is seen as helping to make the statute work in practice, as part of a 'concession to a strict formal equality approach' where discrimination is never allowed.²¹ While this may be correct, determining what is an 'absurdity' requires a normative judgment about the acceptable limits of equality law. This argument therefore supports the normative role of exceptions in concreting the compromise embodied in discrimination law.

The normative limits created by exceptions are fundamentally linked to the aims or objectives of equality law. In age discrimination law, for example, statutes are generally seeking to achieve two, potentially incommensurate, objectives: first, to achieve instrumental economic ends, such as by extending working lives and reducing demand on pension systems; and, second, to achieve intrinsic or dignity ends, and respect the dignity of workers of all ages.²² These two aims are likely to come into conflict: age discrimination can be economically efficient, in some circumstances, while still infringing workers' dignity.²³ Thus, age discrimination law reflects a negotiated compromise regarding how these objectives should be reconciled if they conflict.

¹⁷ See Sargeant, 'The Employment Equality (Age) Regulations 2006' (n 13).

¹⁸ Thornton, 'The Public/Private Dichotomy' (n 12) 453.

¹⁹ Belinda Smith, 'From *Wardley* to *Purvis*: How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, 7.

²⁰ *Ibid.*

²¹ *Ibid.* 8.

²² Fredman (n 3) 103–4.

²³ *Ibid.* 106.

Age discrimination law is therefore aptly regarded as a balancing act, concerned with the intergenerational distribution of goods in society such as work and employment opportunities. Exceptions, then, are a means of striking a balance between conflicting interests. For Thornton, this is a balance between freedom and equality;²⁴ for Fredman, between liberty and equality.²⁵ Exceptions give ‘freedom to act’ to vested interests, and reveal a ‘lukewarm’ commitment to equality, which plays ‘second fiddle to freedom.’²⁶ For Dickens, the balance is between fairness and efficiency:²⁷ the ‘business case for equality’, which was key to prompting equality regulation in Britain, means that the boundaries of regulation may only extend to the extent that they ‘promote and support business interests.’²⁸ Diversity is promoted to the extent that it is ‘good for business,’²⁹ and business profitability is seen as being in the public interest.³⁰

Going further, Thornton also maps exceptions onto the public and private spheres, arguing that discrimination law mandates equality in public, and freedom in private,³¹ enabling the ‘untrammelled pursuit of personal desires’ in the private sphere.³² Harrison and Parkinson see this divide as normatively desirable, and argue that discrimination law should only apply to the commons, with (religious) liberty elsewhere.³³ However, for Thornton, the public–private dichotomy is inherently gendered: traditionally, women have been relegated to the private sphere, and men have occupied the public sphere.³⁴ Accepting the public–private divide therefore limits the scope of equality law to assist women and address gender inequality. Indeed, what is ‘private’ is socially constructed, and often shaped by the state.³⁵ Thus, using the public–

²⁴ Thornton, ‘Excepting Equality’ (n 15) 241.

²⁵ Fredman (n 3) 33.

²⁶ Thornton, ‘Excepting Equality’ (n 15) 240–1.

²⁷ Dickens, ‘The Road Is Long’ (n 13) 468. Fredman describes this as a tension between economic and market concerns and equality: Fredman (n 3) 35–7.

²⁸ Dickens, ‘Re-Regulation for Gender Equality’ (n 13) 299, 306.

²⁹ Sargeant, ‘The Employment Equality (Age) Regulations 2006’ (n 13) 214.

³⁰ Dickens, ‘Re-Regulation for Gender Equality’ (n 13) 306.

³¹ Thornton, ‘Excepting Equality’ (n 15) 241.

³² Thornton, *The Liberal Promise* (n 8) 103.

³³ Joel Harrison and Patrick Parkinson, ‘Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society’ (2014) 40 *Monash University Law Review* 413.

³⁴ Thornton, ‘The Public/Private Dichotomy’ (n 12) 449.

³⁵ *Ibid* 449–51.

private dichotomy as a justification for exceptions to equality law is theoretically problematic and normatively questionable, as it reinforces gender differences.³⁶

It is important to acknowledge the qualitative differences in exceptions to equality law: some operate to allow discrimination in a negative sense by limiting the scope of equality law, as in provisions allowing discrimination to achieve the operational requirements of a position. Other exceptions operate to allow discrimination in a positive sense, such as provisions allowing positive action.³⁷ In both cases, exceptions operate to modify a strict principle of formal equality. In the first case, negative exceptions limit the principle of formal equality to not apply in specific cases or situations. In the second case, positive exceptions limit the principle of formal equality with the aim of achieving substantive equality. This article focuses on the first type of exceptions, which negatively limit the scope of equality law. Positive action is a broader topic, which has been explored elsewhere.³⁸

III THE AUSTRALIAN AND UK LEGAL FRAMEWORKS

In Australia's federal structure, age discrimination in employment is regulated by a myriad of pieces of legislation at federal, state and territory level; and as both an equality issue generally, and in relation to employment particularly. At the federal level, age discrimination claims are made under a specific regulatory framework for age (the *Age Discrimination Act 2004* (Cth) ('ADA')), rather than a single piece of equality legislation for all grounds. Further, claims may be made under either equality legislation (the *ADA*) or employment legislation (the *Fair Work Act 2009* (Cth) ('FWA')). The *FWA* prohibits 'adverse action' on the grounds of age,³⁹ which includes dismissal, injuring an employee in employment, prejudicial altering of an employee's

³⁶ Ibid 449–51, 459–60.

³⁷ See Smith (n 19) 7.

³⁸ Christopher McCrudden, 'Rethinking Positive Action' (1986) 15 *Industrial Law Journal* 219; Lizzie Barmes, 'Equality Law and Experimentation: The Positive Action Challenge' (2009) 68 *Cambridge Law Journal* 623; Lizzie Barmes, 'Navigating Multi-Layered Uncertainty: EU Member State and Organizational Perspectives on Positive Action' in Geraldine Healy, Gill Kirton and Mike Noon (eds), *Equality, Inequalities and Diversity: Contemporary Challenges and Strategies* (Palgrave Macmillan, 2011) 56. This article also excludes discussion of exemptions to equality law that can be granted under the *Australian Human Rights Commission Act 1986* (Cth) s 44 ('ADA') and, to a more limited extent, under the *Equality Act 2010* (UK) s 197 ('EqA').

³⁹ *Fair Work Act 2009* (Cth) s 351(1).

position, or discriminating between the employee and other employees.⁴⁰ The FWA also provides protection against termination of employment on the basis of age.⁴¹ The Australian system represents a complex legal framework, with substantial variation between jurisdictions and between equality and employment legislation. For the purposes of coherence, this article focuses particularly on exceptions under equality legislation, rather than employment legislation.

In Australia, the prohibition of age discrimination in employment is subject to a 'significant number of exceptions'.⁴² In the second reading speech for the ADA, it was explicitly noted that '[a]ll anti-discrimination laws must strike the right balance between prohibiting unfair discrimination and allowing legitimate differential treatment. ... The bill takes a commonsense approach and exempts legitimate distinctions based on age.'⁴³ Thus, the exceptions to the ADA were explicitly linked with the compromises inherent in age discrimination law. These 'legitimate distinctions' spanned a wide range of areas, including superannuation, tax, health, social security and migration, on the basis that '[a]ge differences in these areas are based on distinct and broadly accepted social policy rationales'.⁴⁴ Thus, broad acceptance of various social policy rationales was seen to mean that age-based distinctions were legitimate. At the time, the Council on the Ageing ('COTA') expressed its concern regarding the excessively wide range of exceptions to the ADA.⁴⁵

In 2012, the Australian Commonwealth government released an exposure draft of a consolidated anti-discrimination law ('2012 Draft Bill'), which would have unified the various equality statutes at the federal level.⁴⁶ While there still would have been separate equality and labour law statutes, as well as statutes at the federal, state, and territory level, the 2012 Draft Bill would have

⁴⁰ Ibid s 342(1) item 1.

⁴¹ Ibid s 772(1)(f).

⁴² Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2nd ed, 2014) 6 [1.2.9].

⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17621 (Daryl Williams).

⁴⁴ Ibid 17622.

⁴⁵ COTA National Seniors, Submission No 6 to Australian Senate Legal and Constitutional Committee, *Provisions of the Age Discrimination Bill 2003* (1 September 2003) 2-6.

⁴⁶ Exposure Draft, Human Rights and Anti-Discrimination Bill 2012 (Cth) ('2012 Draft Bill'). For a discussion, see Therese MacDermott, 'Affirming Age: Making Federal Anti-Discrimination Regulation Work for Older Australians' (2013) 26 *Australian Journal of Labour Law* 141.

provided greater uniformity and simplicity in the federal equality structure. The Bill was delayed, and ultimately not pursued with a change of government in 2013.⁴⁷ However, its terms are helpful in illuminating potential challenges to Australian age discrimination law. Most of the exceptions in the *ADA* would have been retained by the 2012 Draft Bill. However, the Bill also included a requirement that the exceptions be reviewed within three years,⁴⁸ recognising the potential overlap between existing exceptions and the proposed new justifiable conduct exception.⁴⁹

The legal situation in the UK is far more straightforward than that in Australia: the *Equality Act 2010* (UK) (*EqA*) is a single piece of legislation prohibiting discrimination because of a range of protected characteristics, including age. There is no separate legislation relating to employment, and while some equality regulation is devolved to Northern Ireland, Wales and Scotland, the core provisions remain largely the same in each region.⁵⁰ The *EqA* consolidated a number of pieces of equality legislation into a single statute in 2010,⁵¹ including the *Employment Equality (Age) Regulations 2006* (UK) SI 2006/1031, which implemented the EU *Framework Directive 2000/78* into UK law as it related to age.⁵² With consolidation, there is a risk that exceptions most relevant to one protected characteristic are unthinkingly imported for others.⁵³ While there are many exceptions that apply uniformly to all protected characteristics in the *EqA*, some differences are retained — particularly for age discrimination. This may reflect the fact that many exceptions to age discrimination law in the UK are based on provisions in the *Framework Directive 2000/78*: the EU had a strong influence on the development of age discrimination law in the UK.

⁴⁷ See Daniel Hirst, 'Anti-Discrimination Laws Overhaul Delayed', *The Sydney Morning Herald* (Sydney, 21 March 2013) 13.

⁴⁸ 2012 Draft Bill (n 46) cl 47.

⁴⁹ Exposure Draft Explanatory Notes, Human Rights and Anti-Discrimination Bill 2012 (Cth) 33 [139]–[142], 48–9 [218]–[219].

⁵⁰ See generally Paul Chaney, *Equality and Public Policy: Exploring the Impact of Devolution in the UK* (University of Wales Press, 2011) 111–46.

⁵¹ Explanatory Notes, *Equality Act 2010* (UK) 2–4 [4]–[11].

⁵² See *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation* [2000] OJ L 303/16 ('*Framework Directive 2000/78*').

⁵³ Maleiha Malik, "'Modernising Discrimination Law': Proposals for a Single Equality Act for Great Britain' (2007) 9 *International Journal of Discrimination and the Law* 73, 78–9.

IV EXCEPTIONS TO AGE DISCRIMINATION LAW

In the sections that follow, I thematically consider case studies of exceptions to age discrimination law in Australia and the UK, focusing on exceptions relating to domestic duties, occupational requirements, religious bodies, statutory provisions, public safety and security, and justified discrimination.⁵⁴ I consider the extent to which these exceptions are appropriate for the functioning of age discrimination legislation, or where they might undermine the potential of age equality law. This discussion reveals that exceptions to age equality law are often different to — and potentially broader than — exceptions in other areas of discrimination law. I argue that this indicates that the compromise reached in the context of age equality law is more focused on instrumental than intrinsic ends, and represents a de-prioritising of the equality principle.

A *Domestic Duties*

The exclusion of domestic duties on residential premises from discrimination law is a key embodiment of the public–private dichotomy, and allows the ‘untrammelled pursuit’ of ageist desires and preferences in the private sphere.⁵⁵ It also reflects the importance of freedom of contract in the common law tradition.⁵⁶ The *ADA* does not apply to the performance of domestic duties on residential premises.⁵⁷ Similar exceptions are in place in Victoria,⁵⁸ Queensland,⁵⁹ the Northern Territory,⁶⁰ Western Australia,⁶¹ New South

⁵⁴ Youth wages — which are excluded from the *ADA* (n 38) s 25 and the *EqA* (n 38) sch 9 items 11–12 — have been analysed by scholars elsewhere: see, eg, Alysia Blackham, ‘Normative Visions of Age: Progress and Change in Australian Labour Law’ in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, 2017) 117. This article also does not consider age discrimination in small partnerships, which are excluded from the scope of the *ADA*: see *ADA* (n 38) s 21. ‘Justified’ discrimination may be best described as a defence to equality law, rather than an exception. However, given the relevance of this provision to exceptions more generally, it is considered here alongside other exceptions.

⁵⁵ Thornton, *The Liberal Promise* (n 8) 103.

⁵⁶ See also Catherine Barnard and Alysia Blackham, ‘Discrimination and the Self-Employed: The Scope of Protection in an Interconnected Age’ in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia, 2017) 197, 209–18.

⁵⁷ *ADA* (n 38) s 18(3). ‘Domestic duties’ is not defined in the *ADA*.

⁵⁸ *Equal Opportunity Act 2010* (Vic) s 24. Victoria includes an additional exception relating to the care of children: at s 25.

⁵⁹ *Anti-Discrimination Act 1991* (Qld) ss 26–7.

Wales,⁶² South Australia,⁶³ and the Australian Capital Territory,⁶⁴ and would have been retained in the 2012 Draft Bill.⁶⁵ This exception does not apply in the UK or in Tasmania.⁶⁶ Similar exceptions exist in sex⁶⁷ and disability⁶⁸ discrimination law in Australia at the federal level.

Consistent with Thornton's arguments, the exclusion of domestic duties on residential premises is highly gendered: the International Labour Organization estimates that Australia had 3,800 domestic workers in 2010, 3,600 of which were women.⁶⁹ These estimates likely significantly understate the number of domestic workers in Australia: the 2016 Census of Population and Housing recorded roughly 36,567 domestic cleaners in Australia (8,522 men and 28,047 women); and 31,822 housekeepers (5,033 men and 26,790 women). When added to other occupations that are likely to constitute 'domestic duties' and occur in a residential setting (such as carers and aides, child carers, personal carers and assistants, age and disabled carers, nursing support, and personal care workers), there could be anywhere up to 432,501 domestic workers in Australia, with over 84% women.⁷⁰ This reflects the growth in the domestic 'outsourcing' of labour.⁷¹

The gender disparities in these figures are striking. Excluding domestic workers from the protections afforded by age discrimination legislation will disproportionately affect women, continuing the public-private dichotomy

⁶⁰ *Anti-Discrimination Act 1992* (NT) s 35(2).

⁶¹ *Equal Opportunity Act 1984* (WA) s 66W(3).

⁶² *Anti-Discrimination Act 1977* (NSW) s 49ZYB(3).

⁶³ In South Australia, this is expressed as employment 'for purposes not connected with a business': *Equal Opportunity Act 1984* (SA) s 85F(1)(a).

⁶⁴ *Discrimination Act 1991* (ACT) s 24. The Australian Capital Territory includes an additional exception relating to the care of children: at s 25.

⁶⁵ 2012 Draft Bill (n 46) cl 43.

⁶⁶ Though the limited application of UK equality law to the self-employed may prevent this difference having much impact in practice: see, eg, *Hashwani v Jivraj* [2011] 1 WLR 1872. Cf *ADA* (n 38) s 20 in relation to contract workers.

⁶⁷ *Sex Discrimination Act 1984* (Cth) s 14(3).

⁶⁸ *Disability Discrimination Act 1992* (Cth) s 15(3).

⁶⁹ International Labour Office, *International Labour Organization, Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection* (Report, 2013) 117.

⁷⁰ See 'TableBuilder', *Australian Bureau of Statistics* (Online Data Tool, 2017) <www.abs.gov.au/websitedbs/D3310114.nsf/Home/2016%20TableBuilder>, archived at <<https://perma.cc/MCJ6-F7NJ>>. Of course, some of these workers would be performing these roles in a commercial setting.

⁷¹ Gabrielle Meagher, *Friend or Flunkey? Paid Domestic Workers in the New Economy* (University of New South Wales Press, 2003) 48.

and reinforcing gender differences.⁷² This also reflects the traditional view that domestic duties are ‘women’s work’.⁷³ In many cases, domestic work will be mediated via third parties, including through the use of agencies, franchises, or company structures.⁷⁴ This limits the utility of employment discrimination law in this context, even without the domestic duties exclusion.⁷⁵

Given that domestic workers experience a myriad of problems at work — including undervaluing of their labour, failure to comply with existing agreements for work, income insecurity and a risk of unfair dismissal⁷⁶ — it appears normatively problematic to also exclude protection from discrimination law. It is also inconsistent with the International Labour Organization’s *Convention (No 189) Concerning Decent Work for Domestic Workers* — not yet ratified by Australia or the UK — which requires members to take measures ‘to respect, promote and realize the fundamental principles and rights at work’ for domestic workers, including ‘the elimination of discrimination in respect of employment and occupation’, by ‘extending or adapting existing measures to cover domestic workers.’⁷⁷ Thus, the need to overcome the gendered public–private dichotomy, and trends in international law, require a fundamental review of the domestic duties exception in the *ADA* and statutes in the states and territories. This is an exception that might fundamentally undermine the potential of age equality law for a group of vulnerable workers.

B Occupational Requirements

Both UK and Australian age discrimination laws make exceptions for occupational requirements, reflecting the tension between fairness and efficiency in equality law.⁷⁸ In Australia, the Australian Chamber of Commerce and Industry (‘ACCI’) originally objected to the *ADA* on the basis that it would undermine merit in employment decisions and would lead to older workers having lighter duties:

⁷² See generally Thornton, ‘The Public/Private Dichotomy’ (n 12).

⁷³ Meagher (n 71) 100.

⁷⁴ *Ibid* 48.

⁷⁵ Though there may be grounds for a discrimination claim against the agency themselves. This is consistent with anecdotal evidence that agencies practice discrimination, including on the basis of age: *ibid* 109.

⁷⁶ *Ibid* 99–100, 102–3.

⁷⁷ Opened for signature 16 June 2011, [2015] ITS 11 (entered into force 5 September 2013) (‘*ILO Convention No 189*’) arts 3(2), 18.

⁷⁸ See Dickens, ‘The Road Is Long’ (n 13) 468.

[T]he laws could open the floodgate to employees demanding easier work conditions because of their age.

... '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 ... 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.'⁷⁹

The ACCI's concerns reflect a perception that age equality will undermine work productivity and will require lighter duties or preferential treatment for older workers. Thus, the exceptions for occupational requirements may be seen as a compromise designed to ensure high work productivity where age impacts upon an individual's ability to fulfil a position.

The ADA does not apply where the applicant or employee 'is unable to carry out the inherent requirements of the particular employment because of age.'⁸⁰ The 'inherent requirements' formulation of this exception echoes that in the International Labour Organization's *Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation*,⁸¹ and is similar to an exception originally included in the *Workplace Relations Act 1996* (Cth) s 170CK(3), which has since been repealed. The exception appears broader than those in other federal discrimination statutes.⁸² Indeed, while the wording of the ADA is similar to the exception under Australian federal disability discrimination legislation,⁸³ it omits that statute's reference to the need for 'reasonable adjustments' in the inherent requirements exception.⁸⁴ Thus, the ADA exception risks significantly undercutting the equality

⁷⁹ Kirsty Magarey, *Age Discrimination Bill 2003* (Bills Digest No 29 2003–04, 8 September 2003) 2–3.

⁸⁰ ADA (n 38) s 18(4). Similarly, the FWA excludes actions 'taken because of the inherent requirements of the ... position': FWA (n 39) s 351(2)(b).

⁸¹ Opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) art 1(2) ('ILO Convention No 111').

⁸² See, eg, *Sex Discrimination Act 1984* (Cth) s 30, which refers to 'a genuine occupational qualification to be a person of a different sex from the sex of the other person'.

⁸³ *Disability Discrimination Act 1992* (Cth) s 21A.

⁸⁴ Ibid. See Therese MacDermott, 'Age Discrimination and Employment Law: The Sky's the Limit' (1998) 11 *Australian Journal of Labour Law* 144.

principle, more so than other formulations of this exception in federal discrimination statutes.⁸⁵

While there is case law on inherent requirements in the context of disability,⁸⁶ the case law in relation to age is limited. Some guidance on what is meant by ‘inherent requirements’ in this context can be gleaned from *Qantas Airways Ltd v Christie*, where a pilot challenged the termination of his employment at age 60.⁸⁷ The pilot’s forced retirement was consistent with the ‘Rule of 60’, an international air standard that prevented state parties from allowing pilots over the age of 60 to act as a pilot in command of an international air flight, and which allowed states to exclude a pilot over 60 from entering their air space.⁸⁸ While the standard did not apply in Australia, it would have prevented Mr Christie from flying to many international destinations.⁸⁹

The Australian High Court provided limited guidance on the test to be used to identify the ‘inherent requirements’ of a position. Indeed, Brennan CJ sought ‘to guard against too final a definition of the means by which the inherent nature of a requirement is determined’, instead preferring a ‘case by case’ approach.⁹⁰ For Gaudron J and McHugh J, an inherent requirement was ‘something that is essential to the position’,⁹¹ or ‘essential to the performance of a particular position’,⁹² and could be derived from the contract of employ-

⁸⁵ However, note the argument that the provision should be interpreted in a limited way, to apply only where an individual is unable to carry out the inherent requirements of the position *because of* age, not because of characteristics relating to age: Rees, Rice and Allen (n 42) 364 [6.4.7.22].

⁸⁶ See, eg, *X v Commonwealth* (1999) 200 CLR 177. For an analysis of the differences between the two jurisdictions, see MacDermott, ‘Age Discrimination and Employment Law’ (n 84).

⁸⁷ (1998) 193 CLR 280 (*‘Christie’*). The case was decided under the *Industrial Relations Act 1988* (Cth) s 170DF(1)(f). This section has been largely replicated in s 772(1)(f) of the *FWA*, meaning *Christie* will have most relevance to the interpretation of the *FWA*. As Rees, Rice and Allen argue, it is more difficult to apply the reasoning in *Christie* to the *ADA*, due to the differences between the legislative schemes: Rees, Rice and Allen (n 42) 376 [6.4.9.4].

⁸⁸ *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) arts 39–40; International Civil Aviation Organization, *Annex 1 to the Convention on International Civil Aviation: Personnel Licensing* (11th ed, July 2011) [2.1.10.1]. See also *Christie* (n 87) 292 [26] (Gaudron J), 325 [135] (Kirby J).

⁸⁹ *Christie* (n 87) 285 [3] (Brennan CJ), 292 [26] (Gaudron J), 305–6 [75], 310 [86]–[87] (McHugh J), 317 [112] (Gummow J), 326 [137] (Kirby J).

⁹⁰ *Ibid* 284 [1].

⁹¹ *Ibid* 294 [34] (Gaudron J).

⁹² *Ibid* 305 [74] (McHugh J).

ment.⁹³ Thus, inherent requirements of a position were not restricted to the ‘characteristic tasks or skills required for the work done in that position.’⁹⁴ To Gaudron J, an inherent requirement could be identified in a practical way by asking ‘whether the position would be essentially the same if that requirement were dispensed with.’⁹⁵ Gummow J adopted a slightly different formulation, more focused on the contract of employment as a determining characteristic:

The ‘position’ here is the particular bundle of contractual rights and obligations, supplemented ... by the operation of statute. In such a setting, the term ‘inherent’ suggests an essential element of that spoken of rather than something inessential or accidental.⁹⁶

Kirby J (in dissent) described inherent requirements as those which are not ‘transient, subject to change, geographically limited or otherwise temporary. The word “inherent” imports those features of the requirements for the particular position as are essential to its very nature.’⁹⁷ Thus, unlike the other Justices, Kirby J emphasised the importance of *permanence* for a requirement to be inherent: the requirement could not vary by time or location.⁹⁸ In sum, then, while all members of the Court regarded an inherent requirement as something ‘essential’ to the position, their interpretation of that term varied significantly.

The High Court ultimately accepted Qantas’s argument that the termination was based on the inherent requirements of the position, although the Court was divided on what the inherent requirement actually was: for Brennan CJ, it was the ability to participate in the bidding system for shifts;⁹⁹ for Gaudron J, it was working a minimum number of hours on trips scheduled by Qantas, but chosen by the pilot in accordance with the rostering system (as opposed to compliance with the rostering system itself);¹⁰⁰ for McHugh J, it was that Mr Christie could fly to a reasonable number of Qantas’s overseas destinations and, therefore, be aged under 60;¹⁰¹ for Gummow J, that Mr Christie be available for service in any part of the world

⁹³ Ibid 307–8 [80] (McHugh J); cf at 295 [37] (Gaudron J).

⁹⁴ Ibid 294 [33] (Gaudron J); see also at 304–5 [72]–[73] (McHugh J).

⁹⁵ Ibid 295 [36].

⁹⁶ Ibid 318 [114].

⁹⁷ Ibid 340 [164].

⁹⁸ Ibid 341 [164].

⁹⁹ Ibid 285 [3]; cf at 295–6 [38]–[39] (Gaudron J).

¹⁰⁰ Ibid 295–6 [38]–[39].

¹⁰¹ Ibid 310 [86].

where Qantas operates;¹⁰² and for Kirby J (in dissent), ‘requirements’ related to rostering and geography were not ‘inherent’ but merely ‘operational’ and liable to change over time.¹⁰³

Thus, it is clear that there is significant scope for disagreement regarding what constitutes an ‘inherent requirement’ and what is ‘essential.’¹⁰⁴ Further, this approach implies that a range of operational requirements that are unrelated to an individual’s capacity to perform the role might nevertheless be ‘inherent.’¹⁰⁵ Thornton has therefore argued that the decision elevates ‘administrative convenience to the status of an inherent requirement’, which gives significant scope to the employer’s management prerogative, and will ‘always’ tilt the outcome of a case towards the employer’s benefit.¹⁰⁶

The outcome in *Christie* may be compared with the various judgments in the *Bradley* litigation — decisions concerning the maximum recruitment age for the Army’s Specialist Service Officer (‘SSO’) Pilot Scheme, which Mr Bradley exceeded.¹⁰⁷ The Commonwealth argued that the inherent requirements of the position included physical fitness.¹⁰⁸ The Human Rights and Equal Opportunity Commission held that physical and medical fitness was an inherent requirement of the position, but that there was ‘no direct correlation between a person’s age and medical fitness.’¹⁰⁹ Wilcox J of the Federal Court similarly held that, to satisfy the exception, there needed to be an ‘extremely close correlation’ between age and the fitness requirement, so that age may be logically treated as proxy for fitness: a logical link between the

¹⁰² Ibid 319 [117].

¹⁰³ Ibid 340–2 [164].

¹⁰⁴ The issue of inherent requirements was also flagged in *Harley v Commonwealth* [2011] FMCA 197, where a 54-year-old man argued that he was discriminated against on the basis of his age when his application to join the RAAF Active Reserve was refused after he failed to pass a fitness ‘beep test’. The reported case only relates to a preliminary procedural question (the appointment of a court expert).

¹⁰⁵ See Therese MacDermott, ‘Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation’ (2011) 34 *University of New South Wales Law Journal* 182, 193. See also MacDermott, ‘Age Discrimination and Employment Law’ (n 84).

¹⁰⁶ Margaret Thornton, ‘Disabling Discrimination Legislation: The High Court and Judicial Activism’ (2009) 15(1) *Australian Journal of Human Rights* 1, 14–15.

¹⁰⁷ *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 158 ALR 468, 469–70 (‘*Bradley (Trial)*’), affd *Commonwealth v Bradley* (1999) 95 FCR 218 (‘*Bradley (Appeal)*’). This case was determined under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (now the *Australian Human Rights Commission Act 1986* (Cth)).

¹⁰⁸ *Bradley (Trial)* (n 107) 475.

¹⁰⁹ Ibid.

two was not sufficient.¹¹⁰ In a later decision, Black CJ held that inherent requirements of the position ‘may’ include the ability to be properly trained (and ‘unlearn’ bad habits), the ability to integrate into the regiment, and the ability to maintain a high level of medical fitness over a six-year term.¹¹¹ While Black CJ assumed that all three of these criteria were inherent requirements, it was held that there was no direct correlation with age.¹¹² The terms of the statute required a ‘tight correlation’ between the rules adopted and the inherent requirements of the position: it was not enough to have a logical link, as this would defeat the purpose of the legislation.¹¹³ Furthermore, it has elsewhere been rejected that having the time and potential to be promoted (that is, before compulsory retirement) was an inherent requirement of the position, such that it justified a failure to promote an older candidate.¹¹⁴

Given this legal complexity, it is unsurprising that the ‘inherent requirements’ exception has led to a number of difficulties in practice: according to the Housing Industry Association, ‘this is an invariably difficult area for business.’¹¹⁵ Assessing the ‘inherent requirements’ exception is a live issue in many disputes.¹¹⁶ More generally, employers can both ‘obscure’ and ‘refute’ claims of age discrimination ‘by hiding behind inherent requirements and the language of merit.’¹¹⁷ According to Easteal, Cheung and Priest, ‘the identification of inherent requirements is vulnerable to conscious and unconscious beliefs about ageing’ and may therefore be susceptible to concerns about unconscious bias.¹¹⁸ The current form of the inherent requirements exception therefore raises substantial cause for concern.

¹¹⁰ Ibid 482.

¹¹¹ *Commonwealth v Bradley* (1999) 95 FCR 218, 232–3 [26]–[29].

¹¹² Ibid 232–3 [26]–[29], 237 [41].

¹¹³ Ibid 234 [33], 235–6 [35]–[37].

¹¹⁴ *Commonwealth v Hamilton* (2000) 108 FCR 378, 395 [62], 396 [67]–[68] (Katz J). Although the Commonwealth admitted that time remaining before retirement did not automatically preclude promotion, meaning it was therefore not a requirement (ie something that must be complied with), as well as not being inherent: at 396 [64]–[65], 397 [73]–[74] (Katz J). See also *Commonwealth v Human Rights and Equal Opportunity Commission* (1999) 57 ALD 623, 625–6 [10]–[11].

¹¹⁵ Housing Industry Association, Submission No 237 to Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (4 December 2015) 7, quoted in Australian Human Rights Commission (n 6) 80.

¹¹⁶ See, eg, *Setchell v Alkira Centre Box Hill Inc* [2009] FMCA 288.

¹¹⁷ Easteal, Cheung and Priest (n 10) 103–4.

¹¹⁸ Ibid 104.

The 2012 Draft Bill retained an ‘inherent requirements’ exception where ‘the other person is unable to carry out the inherent requirements of the particular work because he or she has that protected attribute’ and ‘the discrimination is necessary because the other person is unable to carry out those inherent requirements.’¹¹⁹ The introduction of the requirement that discrimination be ‘necessary’ could lead courts to scrutinise employers’ arguments in far more detail. However, it still raises issues regarding what is properly identified as an ‘inherent requirement’.

A far more limited exception has been adopted in some states and territories. In Victoria,¹²⁰ New South Wales,¹²¹ Western Australia¹²² and the Australian Capital Territory,¹²³ occupational requirements relating to age are limited to those for dramatic performances and modelling, where ‘necessary ... for reasons of authenticity or credibility’;¹²⁴ and/or in providing welfare or education services to people of a particular age, where those services ‘can most effectively be provided by a person of a particular age or age group’.¹²⁵ This represents a far more limited and considered exception for occupational requirements.

Other states and territories, however, have adopted far broader and potentially unbounded exceptions. Discrimination on the basis of age is allowed if based on ‘genuine occupational requirements’ in Tasmania,¹²⁶ Queensland,¹²⁷ the Northern Territory¹²⁸ and South Australia.¹²⁹ There is no additional exposition or limitation in the statutes of what this might entail in practice.¹³⁰

¹¹⁹ 2012 Draft Bill (n 46) cl 24(2).

¹²⁰ *Equal Opportunity Act 2010* (Vic) s 26(3)(a), which relates to artistic performances and models only.

¹²¹ *Anti-Discrimination Act 1977* (NSW) s 49ZYJ.

¹²² *Equal Opportunity Act 1984* (WA) s 66ZQ, which relates to artistic performances, models and welfare services.

¹²³ *Discrimination Act 1991* (ACT) s 57A, which relates to artistic performances, models and welfare services.

¹²⁴ See, eg, *Equal Opportunity Act 2010* (Vic) s 26(3).

¹²⁵ See, eg, *Anti-Discrimination Act 1977* (NSW) s 49ZYJ. In that state, additional classes of jobs or occupations can be added by the regulations: at s 49ZYJ(3).

¹²⁶ *Anti-Discrimination Act 1998* (Tas) s 36.

¹²⁷ *Anti-Discrimination Act 1991* (Qld) s 25.

¹²⁸ *Anti-Discrimination Act 1992* (NT) s 35(1).

¹²⁹ *Equal Opportunity Act 1984* (SA) s 85F(2).

¹³⁰ In the Northern Territory this appears to be extended even further, by allowing an exception for the inability to perform the inherent requirements of the position where special needs have been accommodated: *Anti-Discrimination Act 1992* (NT) s 35(1)(b)(ii).

Additional concessions to efficiency and securing productivity have been made in some states. In Queensland, employers may 'fix reasonable terms' if an employee 'has a restricted capacity to do work genuinely and reasonably required for the position' due to an impairment, or requires special conditions to do the work.¹³¹ In South Australia, the prohibition of age discrimination does not apply if the person 'is not, or would not be, able'¹³²

- (a) to perform adequately, and without endangering himself or herself or other persons, the work genuinely and reasonably required for the employment or position in question; or
- (b) to respond adequately to situations of emergency that should reasonably be anticipated in connection with the employment or position in question.¹³³

In Western Australia, the exception is extended to encompass terms and conditions imposed on the basis of age 'if those terms and conditions are imposed in order to comply with health and safety considerations which are reasonable in the circumstances'.¹³⁴ Thus, the Australian states and territories vary widely in the scope of their occupational requirements exception: some are far more restricted than the *ADA*; some are potentially even broader.

The Australian 'inherent requirements' exception is somewhat similar to the exception in the *EqA* for occupational requirements that are a proportionate means of achieving a legitimate aim.¹³⁵ The exception in the *EqA* is similar to that in the *Framework Directive 2000/78*, which says that

Member States may provide that a difference of treatment which is based on [age] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.¹³⁶

The provision in the *EqA* is arguably broader than that in the Directive, as it omits reference to a 'genuine and determining occupational requirement'.

¹³¹ *Anti-Discrimination Act 1991* (Qld) s 34.

¹³² *Equal Opportunity Act 1984* (SA) s 85F(3).

¹³³ *Ibid.*

¹³⁴ *Equal Opportunity Act 1984* (WA) s 66ZM.

¹³⁵ *EqA* (n 38) sch 9 item 1(1).

¹³⁶ *Framework Directive 2000/78* (n 52) art 4(1).

Like the *ADA* exception, the *EqA* provision appears to seek to balance fairness with efficiency. However, the test is substantially different in the UK, importing the requirement that occupational needs be *proportionate* and directed towards a *legitimate aim*.¹³⁷ This far more explicitly imports a balancing exercise into the exception: aims and means must be assessed in context to establish that an occupational requirement is justified.

While there has been limited case law on the occupational requirement exception in the UK (at least as it relates to age), EU cases address this issue. In Case C-229/08, *Wolf v Stadt Frankfurt am Main*, the Court of Justice of the European Union ('CJEU') considered whether a maximum recruitment age of 30 for firefighters was a genuine occupational requirement.¹³⁸ The CJEU recognised that the aim of the legislation was to guarantee the operational capacity and proper functioning of the fire service, which was a legitimate objective.¹³⁹ High physical capacities might be a genuine and determining operational requirement for intermediate career members of the fire service,¹⁴⁰ and uncontested data produced by the German government demonstrated that physical capacity could decline with age.¹⁴¹ Recruitment at an older age would therefore reduce the number of years in which firefighters could fulfil physically demanding roles.¹⁴² Thus, while the CJEU did not decide the issue (as it was merely providing guidance to the national court),¹⁴³ it noted that the legislation could be seen as appropriate and necessary for achieving legitimate objectives.¹⁴⁴

A different result was reached in Case C-416/13, *Pérez v Ayuntamiento de Oviedo*, where no evidence was presented to show that a recruitment age limit of 30 was necessary to safeguard the operation of the police force, and there was no evidence that the capabilities required of police officers were as 'exceptionally high' as those required of firefighters.¹⁴⁵ This may be contrasted with Case C-258/15, *Sorondo v Academia Vasca de Policía y Emergencias*, where a recruitment age limit of 35 for police officers was held not to be

¹³⁷ *EqA* (n 38) sch 9 item 1(1)(b).

¹³⁸ (C-229/08) [2010] ECR I-1, I-38 [24], I-41 [36].

¹³⁹ *Ibid* I-42 [37]–[39].

¹⁴⁰ *Ibid* I-42–I-43 [40].

¹⁴¹ *Ibid* I-43 [41].

¹⁴² *Ibid* I-43–I-44 [43].

¹⁴³ *Ibid* I-40 [32].

¹⁴⁴ *Ibid* I-44 [44].

¹⁴⁵ (Court of Justice of the European Union, C-416/13, 13 November 2014) [54], [63], [68]–[70].

precluded by *Framework Directive 2000/78*.¹⁴⁶ In that case, evidence was presented of the need for particular physical capacities to perform the essential duties of the police force;¹⁴⁷ that the operational capability of police officers in these positions declined from the age of 40;¹⁴⁸ that officers were phased into less physically demanding roles from age 56;¹⁴⁹ and that there was a need to gradually replace older police officers with younger, more physically capable, officers.¹⁵⁰

Thus, the CJEU appears to be taking a more rigorous approach to the occupational requirements exception than the one taken in Australia: operational requirements (such as a desire to recruit firefighters or police officers for a certain period of service) will only influence the CJEU's decision-making where they are essential to safeguard the operation of the institution. This may be contrasted with *Christie*, where a rostering system was sufficient to persuade the High Court.

The decision in *Christie* may also be contrasted with Case C-447/09, *Prigge v Deutsche Lufthansa AG*, which related to a collective agreement that provided for the automatic termination of pilots' employment at age 60.¹⁵¹ In relation to whether the provision was a genuine occupational requirement, the CJEU held that, for airline pilots,

it is essential that they possess ... particular physical capabilities in so far as physical defects in that profession may have significant consequences. It is also undeniable that those capabilities diminish with age ... It follows that possessing particular physical capabilities may be considered as a 'genuine and determining occupational requirement', within the meaning of Article 4(1) of the Directive, for acting as an airline pilot and that the possession of such capabilities is related to age.¹⁵²

The aim underlying the provision — guaranteeing air traffic safety — was legitimate.¹⁵³ However, it was also necessary to consider whether the provi-

¹⁴⁶ (Court of Justice of the European Union, C-258/15, 15 November 2016) [50].

¹⁴⁷ These were: 'ensuring the protection of people and property, ensuring that each individual can freely exercise his or her rights and freedoms, and ensuring the safety of citizens': *ibid* [36].

¹⁴⁸ *Ibid* [42].

¹⁴⁹ *Ibid* [43].

¹⁵⁰ *Ibid* [45].

¹⁵¹ (C-447/09) [2011] ECR I-8003, I-8036 [2].

¹⁵² *Ibid* I-8059 [67].

¹⁵³ *Ibid* I-8059 [68]–[69].

sion was proportionate.¹⁵⁴ The exception in art 4(1) needed to be interpreted strictly, as it constituted a ‘derogation from the principle of non-discrimination’.¹⁵⁵ Given that national and international legislation allowed pilots over the age of 60 to fly, subject to certain restrictions, this indicated that ‘national and international authorities consider that, until the age of 65, pilots have the physical capabilities to act as a pilot’.¹⁵⁶ By imposing a lower age of 60, the collective agreement imposed a ‘disproportionate requirement’ on the pilots involved.¹⁵⁷ Therefore, the retirement age in the collective agreement was not justified.¹⁵⁸

The multistage test imposed by the *Framework Directive 2000/78* — that the measure represent a genuine and determining occupational requirement, that the objective be legitimate, and that the requirement be proportionate — is far more exacting in practice than the ‘inherent requirements’ test in the *ADA*. The requirement of proportionality ensures that a nuanced balancing exercise occurs between the interests of employers and employees, taking into account broader social and economic objectives. Without this requirement, the *ADA* risks giving employers significant power to determine the ‘inherent requirements’ of a position, such as to exclude workers of different ages.

C Religious Bodies

Both UK and Australian age discrimination statutes contain some exceptions relating to religious or charitable bodies. For Parkinson, exceptions of this nature provide an appropriate level of freedom for religious groups, providing them with the ‘freedom to be different’, rather than forcing religious groups to comply with the will of the majority.¹⁵⁹ This, then, gives religious groups freedom at the margins to build their own communities in accordance with their collective values,¹⁶⁰ offering a balance between (religious) freedom and equality. By contrast, Fredman sees these exceptions as representing a

¹⁵⁴ Ibid I-8059 [70].

¹⁵⁵ Ibid I-8060 [72].

¹⁵⁶ Ibid I-8060 [73].

¹⁵⁷ Ibid I-8060–I-8061 [75].

¹⁵⁸ Ibid I-8062–I-8063 [83].

¹⁵⁹ Patrick Parkinson, ‘Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia: The Freedom to Be Different’ (2007) 81 *Australian Law Journal* 954, 964.

¹⁶⁰ Ibid 965.

compromise between protection of religion and other protected characteristics: religious exceptions give priority to religion in some circumstances.¹⁶¹

Parkinson's argument raises the question of how far this freedom or prioritisation should extend: should it also apply to others who want to build the cohesiveness of their group, such as small employers or clubs, who are small in number and arguably make little practical difference to the rest of the population?¹⁶² Or, conversely, should we see religious groups not as marginal, but as core and powerful employers that wield substantial influence and have important symbolic roles in ensuring the efficacy of age equality law? In Australia, for instance, religious groups are major employers: UnitingCare Australia is one of the largest providers of community services in the country, employing over 40,000 staff and engaging over 30,000 volunteers.¹⁶³ The Catholic Church is 'one of Australia's largest employers', employing around 2% of the Australian workforce or over 180,000 employees.¹⁶⁴ Thus, excluding religious bodies from the scope of discrimination law may substantially undercut the provisions of equality law.

While religious tenets and doctrines often relate to gender, sexuality, and religion, there appears (at least initially) to be less relevance in relation to age. Religious exceptions may well have less relevance to age discrimination, and may have been copied from other discrimination statutes. That said, it is important to note that age discrimination *is* evident in some religious doctrine: age is not irrelevant to religious decision-making. For example, Catholic priests are effectively subject to compulsory retirement. Under the *Code of Canon Law*,

[w]hen a pastor has completed seventy-[f]ive years of age, he is requested to submit his resignation from office to the diocesan bishop who is to decide to accept or defer it after he has considered all the circumstances of the person and place. Attentive to the norms established by the conference of bishops,

¹⁶¹ Fredman (n 3) 84.

¹⁶² Parkinson (n 159) 965. This denies the public significance of small employers — in the UK, small and medium enterprises represented 60% of private sector employment in 2015: Department for Business, Innovation and Skills, *Business Population Estimates for the UK and Regions 2015* (Statistical Release No URN 15/92, 14 October 2015) 1, 4.

¹⁶³ 'The Network', *UnitingCare Australia* (Web Page, 20 June 2016) <www.unitingcare.org.au/network>, archived at <<https://perma.cc/Q6XJ-WQL2>>.

¹⁶⁴ Australian Catholic Council for Employment Relations, *Good Works: The Catholic Church as an Employer in Australia* (2015) 3, 7.

the diocesan bishop must provide suitable support and housing for a retired pastor.¹⁶⁵

Therefore, it is important to remain mindful of existing age-based practices by religious bodies, and the potential significance of religious exceptions at a practical and symbolic level.

More generally, though, religious exceptions do not just balance a conflict between equality and religious freedom. In a study of religious schools, Evans and Gaze found significant diversity in the extent to which exceptions (particularly those relating to gender, religion and sexuality) were used in practice in the schools' work as both employers and educators: while some used the available exceptions 'rarely or never', others used the 'full range' of exceptions available.¹⁶⁶ Indeed, some saw the application of anti-discrimination law to their institution as 'a denial of a fundamental right to religious freedom and autonomy'.¹⁶⁷ The authors therefore concluded that the diversity and heterogeneity of religious schools meant that the use of exceptions to equality law could not be seen as a simple conflict between equality and religious freedom.¹⁶⁸ the issue is more complex, and requires a more nuanced perspective than mere juxtaposition of ideals.

In Australia, s 35 of the *ADA* provides that the prohibition of age discrimination 'does not affect an act or practice of a body established for religious purposes that'

- (a) conforms to the doctrines, tenets or beliefs of that religion; or
- (b) is necessary to avoid injury to the religious sensitivities of adherents of that religion.¹⁶⁹

¹⁶⁵ *Code of Canon Law* bk 2 pt 2 s 2 title 3 ch 6 can 538 § 3 [tr Canon Law Society of America, 'Code of Canon Law', *The Holy See* (Web Page, Libreria Editrice Vaticana, 4 November 2003) <www.vatican.va/archive/ENG1104/_P1U.HTM>, archived at <<https://perma.cc/LG7X-VKB8>>].

¹⁶⁶ Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392, 422.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid* 423.

¹⁶⁹ In the explanatory memorandum to the *ADA*, both (a) and (b) were listed as being necessary to meet the exception: Explanatory Memorandum, Age Discrimination Bill 2003 (Cth) cl 35. Cf the actual terms of the *ADA*, which requires *either* (a) or (b) to be satisfied: Magarey (n 79) 14.

Similar provisions are in place in New South Wales¹⁷⁰ and Western Australia.¹⁷¹ In the Australian Capital Territory, both (a) *and* (b) must be satisfied to meet the exception.¹⁷²

On paper, this exception paves the way for significant detracting from the protection afforded by the *ADA*,¹⁷³ including in employment. The religious exceptions in Australia may be attributable to successful lobbying by religious groups: for example, Parkinson notes that reforms to the New South Wales religious exception were prevented when the government ‘responded to the opposition of the churches’, and did not undertake reform in accordance with the Law Reform Commission’s recommendations.¹⁷⁴

While the *EqA* also contains exceptions for charitable bodies,¹⁷⁵ these do *not* apply to age discrimination in employment.¹⁷⁶ Exceptions relating to employment by religious bodies are confined to the grounds of sex, marriage, sexuality, transgender status,¹⁷⁷ and religious belief.¹⁷⁸ Thus, the exception for charitable and/or religious bodies is much narrower in the UK in relation to employment discrimination.

The exception in many Australian states and territories is also narrower than that in the *ADA*: in Victoria, for example, age discrimination is only excepted for the appointment, ordination, and training of priests, ministers or members of a religious order, and for the selection and appointment of people to perform or participate in religious observances or practices.¹⁷⁹ Actions conforming with the doctrines of the religion, or done to avoid injury to the religious sensitivities of adherents of the religion, are only excluded where they relate to religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity — not age.¹⁸⁰ Similar

¹⁷⁰ *Anti-Discrimination Act 1977* (NSW) s 56.

¹⁷¹ *Equal Opportunity Act 1984* (WA) s 72; see also at s 73.

¹⁷² *Discrimination Act 1991* (ACT) s 32(d); see also at s 33 on religious educational institutions.

¹⁷³ Similarly, the *FWA* excludes action taken in good faith against a staff member in a religious institution ‘to avoid injury to the religious susceptibilities of adherents of that religion or creed’: *FWA* (n 39) s 351(2)(c).

¹⁷⁴ Parkinson (n 159) 964.

¹⁷⁵ *EqA* (n 39) s 193.

¹⁷⁶ *Ibid* s 193(9).

¹⁷⁷ *Ibid* sch 9 item 2.

¹⁷⁸ *Ibid* sch 9 items 2–3.

¹⁷⁹ *Equal Opportunity Act 2010* (Vic) s 82(1). A similar provision is in place in Queensland: *Anti-Discrimination Act 1991* (Qld) s 109.

¹⁸⁰ *Equal Opportunity Act 2010* (Vic) s 82(2).

provisions are in place in the Northern Territory;¹⁸¹ and in Tasmania and South Australia, the religious bodies exception does not apply to age discrimination.¹⁸² In Queensland, the broader exception relating to religious doctrines and sensitivities does not apply to work.¹⁸³

These exceptions call into question the extent to which religious autonomy should be recognised, particularly when religious groups fulfil a public role as a major employer. The *ADA* exception potentially allows age discrimination to occur even when a religious tenet or belief is unrelated to the employee's actual role or position. In the EU, for example, Temperman has argued that exceptions should apply to ecclesiastical roles, but not roles that do not merit a religious requirement (such as cleaners, secretaries, or catering staff).¹⁸⁴ This is consistent with the first limb of the exception in Victoria, which relates to priests and ministers of religion. The *ADA* exception requires no examination of the employee's position or responsibility: a blanket exception is merely provided for discrimination that 'conforms to the doctrines, tenets or beliefs of that religion'.¹⁸⁵ The current drafting of the *ADA* exception provides no scope to balance religious freedom and the right that is being overruled; there is no opportunity to consider the relative importance of competing priorities, as one right has 'absolute priority over the other'.¹⁸⁶ Thus, Evans and Gaze (writing in the context of religious schools) argue there is scope for a more contextual approach in relation to religious exceptions to equality law in Australia.¹⁸⁷

The religious exceptions to federal age discrimination law in Australia were reframed slightly in the 2012 Draft Bill. Rather than offering a blanket exception for religious groups, the age discrimination exception in the 2012 Draft Bill was limited to the appointment of priests, ministers, and 'persons to perform duties or functions' in religious services.¹⁸⁸ Age was not one of the grounds included in the broad exceptions for conduct by religious groups.¹⁸⁹

¹⁸¹ *Anti-Discrimination Act 1992* (NT) ss 37A, 51.

¹⁸² Cf *Equal Opportunity Act 1984* (SA) s 85ZM; *Anti-Discrimination Act 1998* (Tas) s 51.

¹⁸³ *Anti-Discrimination Act 1991* (Qld) s 109; see also at s 25(6), which excludes age.

¹⁸⁴ Jeroen Temperman, 'Recognition, Registration and Autonomy of Religious Groups: European Approaches and Their Human Rights Implications' in David M Kirkham (ed), *State Responses to Minority Religions* (Ashgate, 2013) 151, 161.

¹⁸⁵ *ADA* (n 38) s 35(a).

¹⁸⁶ Evans and Gaze (n 166) 423.

¹⁸⁷ *Ibid.*

¹⁸⁸ 2012 Draft Bill (n 46) cl 32.

¹⁸⁹ *Ibid* cl 33.

This implies that including a wide religious exception in the *ADA* was unnecessarily broad, and that changes could be made to this exception without causing too many difficulties. Indeed, it is hard to justify the retention of this broad exception given the importance of religious institutions as employers at a practical and symbolic level.

D *Statutory Provisions*

Exceptions are also provided in age discrimination law for complying with other statutory provisions or court decisions. This arguably shows the ‘subordinate status’ of equality law, which is subject to discrimination embedded in other statutes and laws.¹⁹⁰ This, then, is ‘potentially one of the most devastating’ exceptions to age discrimination law.¹⁹¹

The *ADA* includes an exception for acts done in ‘direct compliance’ with a specified law, statute or court order.¹⁹² This exception would have been retained and extended in the 2012 Draft Bill, which included exceptions for complying with Commonwealth laws and complying with court determinations.¹⁹³ In *Keech v Metropolitan Health Service (WA)*, which related to workers’ compensation payments, the Court held that ‘direct compliance’ with a law or statute

requires that impugned conduct is conduct which is actuated by an obligation which is directly imposed upon a party by the provisions of a statute or other nominated statutory instrument, rather than by directions made, or given, pursuant to a general power to give directions provided for in a statute.¹⁹⁴

By making workers’ compensation payments for the duration of the term specified in the statute, and no longer than that period, the respondent in *Keech* ‘acted in direct compliance with the statute’, despite the fact that the respondent was ‘at liberty’ to continue making the payments.¹⁹⁵

Different formulations of this exception are in place in the states and territories. In Victoria, actions are excepted if they are ‘necessary to comply with,

¹⁹⁰ Thornton, *The Liberal Promise* (n 8) 133.

¹⁹¹ Ibid 132–3. Indeed, Rees, Rice and Allen argue that there may be hundreds, if not thousands, of provisions in state and territory statutes that discriminate on the basis of age, which are excluded under the *ADA* exception: Rees, Rice and Allen (n 42) 562.

¹⁹² *ADA* (n 38) s 39; see also at ss 38, 40–1.

¹⁹³ 2012 Draft Bill (n 46) cls 26, 31.

¹⁹⁴ (2010) 215 FCR 393, 401 [44].

¹⁹⁵ Ibid 401 [45]–[46].

or ... authorised by' an act or enactment¹⁹⁶ or necessary to comply with an order of a court or tribunal.¹⁹⁷ A similar formulation is in place in the Northern Territory, although that Act refers to acts being 'specifically authorised'.¹⁹⁸ In Tasmania, acts are allowed if 'reasonably necessary to comply with' a law or order of a court,¹⁹⁹ and in New South Wales, Western Australia and the Australian Capital Territory if they are 'necessary' to comply with a law or order of a court.²⁰⁰ Statutory authority is not an exception in South Australia; and in Western Australia and Queensland the exception only applies to statutes that were in force at the time the legislation came into operation.²⁰¹

By contrast, under the *EqA*, a person does not contravene a provision relating to age discrimination if they do anything they 'must do' pursuant to a requirement of an enactment.²⁰² In practice, the requirement that employers 'must do' the thing pursuant to the enactment imposes a far higher degree of scrutiny on employer actions. In the UK case of *Heron v Sefton Metropolitan Borough Council*, Ms Heron received a redundancy payment calculated in accordance with the Civil Service Compensation Scheme 1994, which was made by the Minister under the *Superannuation Act 1972* (UK) s 1(1).²⁰³ Under the Compensation Scheme, employees above the pension age would receive only six months' pay in the event of a compulsory redundancy, not an amount calculated based on their years of service.²⁰⁴

Sefton Metropolitan Borough Council argued that the difference in treatment was covered by the statutory exception to the *EqA*.²⁰⁵ The Employment Appeal Tribunal found that the exception did not apply to this case because, while the Compensation Scheme provided for a difference in treatment on the basis of age, 'it [did] not *require* that difference to be respected. A requirement

¹⁹⁶ *Equal Opportunity Act 2010* (Vic) s 75. In Queensland, this reads 'specifically authorised by' an Act or court order: *Anti-Discrimination Act 1991* (Qld) s 106.

¹⁹⁷ *Equal Opportunity Act 2010* (Vic) s 76.

¹⁹⁸ *Anti-Discrimination Act 1992* (NT) s 53.

¹⁹⁹ *Anti-Discrimination Act 1998* (Tas) s 24.

²⁰⁰ *Discrimination Act 1991* (ACT) s 30; *Anti-Discrimination Act 1977* (NSW) s 54; *Equal Opportunity Act 1984* (WA) ss 66ZS, 69.

²⁰¹ *Anti-Discrimination Act 1991* (Qld) s 106(1)(a); *Equal Opportunity Act 1984* (WA) s 66ZS(1)(a).

²⁰² *EqA* (n 38) sch 22 item 1(1).

²⁰³ (Employment Appeal Tribunal, Mitting J, 29 October 2013) [2], [6]–[7].

²⁰⁴ *Ibid* [10]–[11].

²⁰⁵ *Ibid* [13]. See *EqA* (n 38) sch 22 item 1(1).

is something which means that the person subject to it *cannot do otherwise*.²⁰⁶ Further, the Compensation Scheme did not apply directly to Ms Heron's employment: it was incorporated into her contract.²⁰⁷ Thus, the terms were contractual (not statutory) even if they required the Council to pay no more than six months' pay.²⁰⁸ Thus, the way the UK exception has been applied by the courts imposes a far higher standard of scrutiny on employers' actions, and has less risk of undermining the statutory protection of age equality.

E Public Safety and Security

Similar to concerns that age discrimination law will affect organisational productivity and efficiency, there is also a concern that age equality may impair public safety or security. This would presumably occur if older workers were employed in positions for which they lacked the physical or mental capacity to perform the role, and where a failure to perform had security or safety implications. Arguably, this could be covered under an inherent requirements or occupational requirements exception, and does not need specific provision in age discrimination law. Despite this, some jurisdictions make provision for exceptions for national security and/or public safety.

In the *EqA*, s 192 provides an exception for doing acts 'for the purpose of safeguarding national security', so long as the acts are proportionate. Further, the age discrimination provisions do not apply to service in the armed forces.²⁰⁹ Section 192 appears to reflect art 2(5) of the *Framework Directive 2000/78*, which provides that that directive is

without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

This provision was considered in Case C-447/09, *Prigge v Deutsche Lufthansa AG*, where the social partners argued that the retirement age was 'appropriate to limit the possibility for pilots to act as pilots to age 60 for reasons of the safety of passengers, persons in areas over which aircraft fly and the safety of

²⁰⁶ *Heron* (n 203) [18] (emphasis added).

²⁰⁷ *Ibid* [20].

²⁰⁸ *Ibid*.

²⁰⁹ *EqA* (n 38) sch 9 item 4(3).

pilots themselves,²¹⁰ and therefore fell within art 2(5). The CJEU rejected this argument as the age provisions were not necessary to achieve the aim of public security: indeed, national and international legislation did not prohibit those over 60 from acting as pilots, it just restrained their activities.²¹¹

In the *ADA*, any concern about public safety is provided for via the exception for compliance with statutory provisions: civil aviation safety regulations and defence personnel regulations are explicitly exempt under s 39.²¹² However, some states and territories make exceptions for public health. In Queensland, acts are allowed if ‘reasonably necessary to protect public health’ or occupational health and safety.²¹³ Exceptions are also made in Western Australia and the Australian Capital Territory for imposing terms and conditions to comply with ‘health and safety considerations which are reasonable in the circumstances’.²¹⁴

F Objectively Justifying Discrimination

The foregoing discussion has illustrated that the exceptions to the *ADA* are significantly more wide-reaching than those under the *EqA*. However, where UK employers are not covered by an explicit statutory exception, there is the possibility of objectively justifying direct age discrimination: this cannot be done under the *ADA*. The *EqA* allows less favourable treatment on the grounds of age to be objectively justified if the treatment is shown to be ‘a proportionate means of achieving a legitimate aim’.²¹⁵ This does not apply to any other protected characteristic.²¹⁶

The ability to justify direct discrimination under the *EqA* offers the prospect of conducting a judicially-scrutinised balancing exercise, to allow a

²¹⁰ *Prigge* (n 151) I-8057 [62].

²¹¹ *Ibid* I-8058 [63].

²¹² *ADA* (n 38) s 39(1), sch 1 items 15C, 24.

²¹³ *Anti-Discrimination Act 1991* (Qld) ss 107–8.

²¹⁴ *Equal Opportunity Act 1984* (WA) s 66ZM. In the Australian Capital Territory, health and safety requirements must be both reasonable and relevant: *Discrimination Act 1991* (ACT) s 57C.

²¹⁵ *EqA* (n 38) s 13(2).

²¹⁶ Indirect discrimination may also be justified as a ‘proportionate means of achieving a legitimate aim’: *ibid* s 19(2). Compare the test under the *ADA*, where the condition, requirement or practice must be shown to be ‘not reasonable in the circumstances’ to establish indirect discrimination: *ADA* (n 38) s 15(1)(b). Note, however, that ‘the burden of proving that the condition, requirement or practice is reasonable ... lies on the discriminator’: at s 15(2).

context-sensitive and negotiated solution to competing interests.²¹⁷ The balance struck will depend on the weight given to equality compared with other competing claims.²¹⁸ By requiring measures to pursue a ‘legitimate aim’, the *EqA* incorporates broader social and economic interests into the balancing exercise. For example, in the context of mandatory retirement, and in light of developing EU jurisprudence,²¹⁹ the UK Supreme Court has identified two broad categories of legitimate aims that may support an employer-justified retirement age: first, *intergenerational fairness*; and, second, *dignity*.²²⁰ However, in that case, the Supreme Court concluded that the UK had decided to give employers the flexibility to choose which objectives to pursue — so long as they could count as ‘legitimate objectives of a public interest nature’, were consistent with the state’s social policy aims, and the means used to achieve the objectives were proportionate.²²¹ This implies that while it is for states to identify broad social policy aims, employers may articulate and apply those aims as they relate to their particular circumstances. Indeed, even where aims are directed to an employer’s own best interests, this will not prevent them being legitimate social policy aims.²²² This may reduce the extent to which broader interests are incorporated into the balancing exercise under the objective justification process.²²³

It is also unclear whether there will be sufficient judicial scrutiny of employer practices to ensure the legitimacy of the balancing exercise. Courts and tribunals may lack the willingness or capacity to subject employer policies to detailed scrutiny, meaning they are likely to defer to organisational decision-makers.²²⁴ More generally, the balancing process is only publicly scrutinised when an individual complaint is made to a court or tribunal. In practice, employers may be adopting age discriminatory practices without conducting any balancing exercise or considering possible alternatives: for example, in a

²¹⁷ See Hendrickx (n 4) 27; Fredman (n 3) 197.

²¹⁸ Fredman (n 3) 190.

²¹⁹ *Seldon v Clarkson Wright & Jakes* [2012] ICR 716, 734 [56]. See, eg, *Wolf* (n 138); *Prigge* (n 151), discussed in Part IV(B).

²²⁰ That is, ‘the avoidance of unseemly debates about capacity’: *Seldon* (n 219) 734 [56]–[58] (Baroness Hale SCJ).

²²¹ *Ibid* 734 [55] (Baroness Hale SCJ).

²²² *Ibid* 739–40 [75] (Lord Hope DPSC).

²²³ See, eg, the discussion of whether ‘cost-saving[s]’ are a legitimate aim: Jackie Lane, ‘*Woodcock v Cumbria Primary Care Trust: The Objective Justification Test for Age Discrimination*’ (2013) 76 *Modern Law Review* 146.

²²⁴ Samuel R Bagenstos, ‘The Structural Turn and the Limits of Antidiscrimination Law’ (2006) 94 *California Law Review* 1, 20–1, 25–6.

survey of employers, of the 19% of respondents that had retained a retirement age for their workforce, the majority failed to provide a justification for their retirement age when asked.²²⁵ Thus, the potential for the objective justification process to prompt an effective balancing exercise may be limited in practice.

Overall, the ability to objectively justify direct age discrimination may lead to the retention of a number of socially undesirable and age-discriminatory employment policies without any effective balancing exercise or negotiation being conducted. Allowing age-based practices to be justified may have significant consequences in practice for employment terms and conditions, and could have a significantly deleterious effect on individual employees.

At the same time, not allowing age discrimination to be objectively justified may lead to a more conservative interpretation of discrimination statutes, and a broader interpretation of exceptions, particularly in the context of complex legal provisions.²²⁶ In Australia, these challenges could have been addressed to some extent by the 2012 Draft Bill, which would have streamlined the various exceptions in the *ADA* and included a general justification defence for ‘justifiable’ conduct. Conduct was defined as ‘justifiable’ where

- (a) the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim; and
- (b) that aim is a legitimate aim; and
- (c) the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and
- (d) the conduct is a proportionate means of achieving that aim.²²⁷

In determining whether conduct was ‘justifiable’, courts would be required to consider

- (a) the objects of [the legislation];
- (b) the nature and extent of the discriminatory effect of the conduct;
- (c) whether the ... person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect;

²²⁵ Robert Thomas et al, Speechly Bircham and King’s College London Management Learning Board, *Recovery in Sight? The State of HR* (Survey, 2013) 8.

²²⁶ See Alysia Blackham, ‘Defining “Discrimination” in UK and Australian Age Discrimination Law’ (2017) 43 *Monash University Law Review* (forthcoming).

²²⁷ 2012 Draft Bill (n 46) cl 23(3).

(d) the cost and feasibility of engaging in other conduct ...²²⁸

In its report on the 2012 Draft Bill, the Senate Legal and Constitutional Affairs Legislation Committee noted the concerns of a number of submissions and witnesses regarding the wording of cl 23.²²⁹ In particular, concerns were expressed that there was no clear definition of ‘legitimate aims’ and ‘proportionate’ in the Bill, creating confusion and necessitating judicial determinations before employers and employees could have legal certainty.²³⁰ Further, the 2012 Draft Bill also retained many other exceptions, meaning the justification defence would be *in addition* to the existing exceptions, not instead of them.²³¹ There was therefore a risk that the ‘justifiable conduct’ provision would undermine legal protection against discrimination. The UK experience lends some weight to this argument, as it does not appear to have prompted an effective balancing exercise in practice.

There are additional age-based exceptions in some states and territories. For example, early or voluntary retirement schemes are the subject of specific exceptions in Victoria,²³² New South Wales,²³³ Western Australia²³⁴ and Tasmania;²³⁵ compulsory retirement is an exception to the laws in Tasmania²³⁶ and the Northern Territory;²³⁷ and there is an exception in Queensland if a retirement age was imposed prior to 1994 or relates to a partnership.²³⁸ Voluntary retirement schemes and compulsory retirement ages may both be objectively justified under the *EqA*. Indeed, the objective justification process allows for a wide variety of age-based measures to be adopted or retained. Despite this, two specific exceptions (which could have been covered by the objective justification process) are included in the *EqA*: first, for benefits tied to length of service; and second, for redundancy pay.²³⁹ These exceptions may

²²⁸ Ibid cl 23(4).

²²⁹ Legal and Constitutional Affairs Legislation Committee, Senate, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Report, February 2013) 53–5 [5.5]–[5.13].

²³⁰ Ibid. Indeed, this is how the defence has played out in the UK.

²³¹ See 2012 Draft Bill (n 46) pt 2-2 div 4.

²³² *Equal Opportunity Act 2010* (Vic) s 29.

²³³ *Anti-Discrimination Act 1977* (NSW) s 49ZYK.

²³⁴ *Equal Opportunity Act 1984* (WA) s 66ZN.

²³⁵ *Anti-Discrimination Act 1998* (Tas) s 35.

²³⁶ Ibid.

²³⁷ *Anti-Discrimination Act 1992* (NT) s 36. It is questionable whether this will be valid, as it is inconsistent with federal laws.

²³⁸ *Anti-Discrimination Act 1991* (Qld) ss 32, 106A.

²³⁹ *EqA* (n 38) sch 9 items 10, 13.

have been introduced to provide a level of legal clarity around common age-based practices; or may be thought to provide a more structured approach to two contentious issues. Thus, while the objective justification process has the potential to cover a wide range of age-based measures, the test does not appear to offer sufficient certainty or specificity in some circumstances.

V DISCUSSION AND LESSONS

The foregoing analysis has revealed the very real tensions inherent in age discrimination law, and the various ways these tensions have been managed via exceptions in Australia and the UK. These exceptions reflect an attempt to balance equality and freedom; equality and efficiency; public and private interests; and instrumental and intrinsic aims of age equality law. The exceptions to the *ADA* are much broader than those under the *EqA*, reflecting a prioritisation of freedom (and religious freedom in particular), efficiency, and the instrumental ends of age discrimination law. However, the broader exceptions under the Australian legislation are balanced by the ability to objectively justify direct age discrimination under the *EqA*. This comparative analysis has therefore revealed a fundamental difference in the structure of exceptions under UK and Australian age discrimination law: UK law tends towards less specific exceptions, relying instead on a general justification defence;²⁴⁰ Australian law tends towards specific exceptions that attempt to provide for all possible eventualities, without an objective justification defence.

It is an open question whether the ability to justify direct age discrimination is a positive development, or whether it could serve to undermine the legal protection afforded by equality law. In the UK, a handful of employers have used the justification provisions to maintain mandatory retirement ages and to adopt age-based policies in relation to a range of employment practices.²⁴¹ While some of these policies might benefit older workers (such as higher redundancy pay), others may well curtail their employment prematurely (such as mandatory retirement) and have socially undesirable consequences.²⁴² Thus, it is debatable whether the 2012 Draft Bill would have been a

²⁴⁰ This may reflect the EU-influenced human rights framework in the UK, where proportionality is a key principle.

²⁴¹ See, eg, Alysia Blackham, 'Falling on Their Feet: Young Workers, Employment and Age Discrimination' (2015) 44 *Industrial Law Journal* 246.

²⁴² Rachel Filinson, 'Age Discrimination Legislation in the UK: A Comparative and Gerontological Analysis' (2008) 23 *Journal of Cross-Cultural Gerontology* 225, 234–5.

positive development in Australia in allowing age discrimination to be justified. Indeed, some UK scholars have argued that the *EqA* should be amended to introduce a specific and limited list of acceptable exceptions to age discrimination laws,²⁴³ as is arguably provided for in the Australian statutes. This raises more fundamental questions regarding whether age as a protected characteristic is special or different when compared with other sorts of discrimination,²⁴⁴ to the extent that a justification provision is required for direct discrimination. These deeper questions need to be addressed, particularly given the proposals in the 2012 Draft Bill in the Australian context, and the continuing ability to justify direct discrimination in the UK context.

Overall, the extensive exceptions to age discrimination law under the *EqA*, *ADA*, and state and territory statutes send a clear message that age equality and intrinsic ends are secondary to other, competing considerations. This seriously undermines the symbolic and progressive potential of age discrimination law.²⁴⁵ Considered thought therefore must be given to whether there is a need to limit or amend existing exceptions, and the desirability of a general justification defence. In particular, this article has questioned the breadth and scope of exceptions relating to domestic duties, occupational requirements, religious bodies and statutory provisions. Limiting exceptions would endorse an individual rights perspective and the intrinsic motivations of equality law. It would help to promote addressing age discrimination as a primary priority, rather than just a means of achieving workforce diversity and instrumental ends.²⁴⁶ Thus, effectively responding to demographic ageing demands a reconsideration of the scope and appropriateness of existing exceptions to age discrimination law.

VI CONCLUSION

Dramatic demographic change, and the potential economic costs of an ageing population, have brought age discrimination laws and their effectiveness to the front of governments' minds. This article has emphasised the tensions and

²⁴³ See, eg. Select Committee on Education and Employment, UK Parliament, *Age Discrimination in Employment* (House of Commons Paper No 259, Session 2000–01) app 17 (Memorandum from GMB Research Department) <www.publications.parliament.uk/pa/cm200001/cmselect/cmduemp/259/259ap19.htm>, archived at <<https://perma.cc/2V36-F7BF>>. See generally Sargeant, 'The Employment Equality (Age) Regulations 2006' (n 13) 220.

²⁴⁴ For full analysis, see Filinson (n 242) 230–3.

²⁴⁵ See Rees, Rice and Allen (n 42) 357 [6.4.7.3], 517.

²⁴⁶ Sargeant, 'The Employment Equality (Age) Regulations 2006' (n 13) 218.

compromises inherent in age discrimination law, and demonstrated how these tensions might be managed via exceptions to equality law. While these exceptions sometimes represent a negotiated compromise, others risk undermining the equality principle to a substantial extent. Rather than copying boilerplate provisions from other equality statutes, or merely applying other exceptions to age, serious thought needs to be given to whether these exceptions are appropriate in the context of age equality, or whether they just serve to undermine legal protection as a concession to vested interests. While often neglected as a topic of study, exceptions to equality law reveal significant insights about governmental priorities and national sentiments. In both Australia and the UK, it is timely to review and reconsider exceptions to age equality law.