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ADDRESSING AGE DISCRIMINATION IN EMPLOYMENT

A report on the findings of Australian Research
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This project aimed to research the effectiveness of Australian age discrimination laws. While demographic ageing necessitates extending working lives, few question the effectiveness of Australian age discrimination laws in supporting this ambition. This project drew on mixed methods and comparative UK experiences to offer empirical and theoretical insights into Australian age discrimination law. It sought to create a normative model for legal reform in Australia, to inform public policy and debate and improve responses to demographic ageing, providing economic, health and social benefits.

Methods and approach

The research drew on a reflexive law theoretical standpoint. It adopted a mixed methods research methodology, integrating qualitative and quantitative data. Conducted between 2015 and 2020, the qualitative aspects of the project included comparative legal doctrinal research across Australia and the UK and qualitative expert interviews with 101 expert respondents, including legal practitioners, industrial advocates, academics, representatives from unions, equality agencies, non-government organisations, and government. The quantitative elements included statistical analysis of claims and cases, using data from statutory agencies, community legal centres, courts and tribunals; datasets created from quantitative content analysis of 1208 reported UK Employment Tribunal decisions, and 108 Australian cases; and a survey of 76 legal practitioners and industrial advocates.

Key findings

Age discrimination is **pervasive, subtle, and socially accepted**, occurring across the life-cycle of employment, from recruitment to termination. There are strong theoretical and practical arguments for ensuring protection from age discrimination at work. There are at least two compelling areas in which the market is unable to resolve issues of age discrimination without regulatory intervention: in relation to securing dignity and preventing harmful age-based stereotypes; and in relation to re-distribution and addressing disadvantage. Age therefore remains an essential lens for interrogating discrimination and inequality. Indeed, **age amplifies and intensifies other forms of inequality**.

The enduring prevalence of age discrimination at work presents a strong case for critique and reform of the legal framework; the very nature of age discrimination may make existing models of enforcement problematic. However, the way age discrimination law has been developed and implemented is beset by enduring tensions. These are perceived tensions between:

- Economic and human rights goals.
- The individual and the collective.
- Different generations.
- Public and private spheres.
- Views of equality as 'sameness' or equal treatment; and recognizing difference.
- Agency and protection.

These tensions are evident in the way the law is framed, perceived and implemented.

Individual Enforcement

National models of age discrimination law primarily rely on individual enforcement for the prevention and redress of age discrimination at work. Individual enforcement is the primary mechanism by which rights to be protected from discrimination are enforced.

Individual enforcement is **fundamentally flawed** for addressing age discrimination at work, because:

- It reflects a view of equality as an individual wrong, when inequality is better viewed using a group-oriented approach, a focus on organizational change, and/or recognising inequality as a societal harm.
- It assumes those who experience discrimination fit the archetype of the rational, utility maximising individual, able to (1) perceive discrimination and (2) who will logically wish to see discrimination addressed and remedied. This is not realistic in practice, as:
 - It is difficult to 'name' or identify discrimination when it is subtle and not overt, and hard to identify why things have occurred. This is compounded by internalized age norms and ageism, which reduce our ability to perceive age discrimination as an injurious experience.
 - People react to experiencing discrimination in different ways. This diversity is not accommodated within the legal framework. Discrimination law overlooks cases where claimants are pro-social, seeking to mend relationships, or choose to withdraw from a situation.
- Individual enforcement will therefore only address a small minority of instances of discrimination, avoidance and exclusion. In practice, individual enforcement is likely to be the exception, not the norm. This is exacerbated by:
 - Power disparities between employers and employees, including in the legal process.
 - Limited legal remedies, which are reactive and do not match what people want.
 - Putting the burden of achieving structural change on individuals and community groups, rather than government and organizations, who are in a better position to effect meaningful change.

Claiming

Overall, relying on individuals to address discrimination through individualized complaints-based mechanisms appears highly unrealistic. This is supported by **complaint data** sourced from equality agencies and statutory conciliators, which shows:

- Age discrimination complaints are rare. Individual age discrimination claims occur at far lower rates than might be expected based on the reported prevalence of discriminatory treatment.
- Individuals appear far more likely to 'lump it', exit or attempt to resolve a matter internally than to approach external agencies or bring legal proceedings. That said, there is no evidence that disputes are being resolved effectively informally or locally, rather than directed to statutory agencies.
- While demographic data on complainants is limited, complaints by young workers appear particularly rare. Gaps in complaining also appear to affect women, those with caring responsibilities, First Nations Australians, those in insecure work, and those over 60. People in these groups are more likely to inquire about age discrimination than to complain. These gaps in complaining are particularly evident in jurisdictions where costs are awarded (as under Australian federal discrimination law).
- Multiple grounds of claim are common at complaint stage, but age claims often fall away as a claim progresses, being withdrawn or abandoned to focus on stronger claims. An intersectional lens is therefore key to understanding experiences of age discrimination.

- Recruitment – not dismissal – is the most common substantive issue in complaints. By contrast, many cases that proceed to court or tribunal concern dismissal.

Barriers to claiming are substantial, and the perceived risks or costs of taking action far outweigh the perceived benefits of claiming. In particular, claiming is inhibited by:

- Fear of retribution, victimization or reputational damage
- Fear of being exposed to costs orders
- The non-financial costs of claiming, including increased stress, anxiety, and mental load and adverse mental health impacts
- A lack of information and advice, and limited access to legal expertise
- Limited remedies, which do not address the harm experienced
- Restrictive time limits
- Limited proof or evidence
- Social norms against claiming
- Limited accessibility of legal processes

Alternative dispute resolution

If a claim is made, alternative dispute resolution (ADR) and conciliation offer more flexible, efficient and cost-effective ways of resolving disputes than court hearings. However, there is a difference between intensive conciliation (conducted by Australian equality agencies), which is time and resource intensive, focused on restorative justice, and highly effective at resolving disputes; and light-touch conciliation (conducted by the Fair Work Commission and Acas), which is highly efficient, but does not always address the underlying issues in the dispute.

While conciliation and ADR resolve the vast majority of age discrimination complaints, many complaints are withdrawn prior to conciliation. Conciliated outcomes may also be gendered. Given the sheer number of claims resolved via ADR (or withdrawn or abandoned during ADR processes), **transparency is essential to strengthen the individual and systemic outcomes achieved via conciliation**. Further, statutory agencies need to closely monitor whether trends in withdrawal and conciliated outcomes are gendered or disproportionately affect those with other protected characteristics.

Court and tribunal proceedings

The initial costs of claiming – financial, personal, reputational, and relational – are amplified as claims progress to the more formal processes of a court or tribunal. As costs escalate, the combined effects of time limits, a lack of legal assistance (or costly legal assistance), the burden of proof, and the risk of adverse costs orders make age discrimination claims unlikely. That said, Australian courts and tribunals rarely collect or publish disaggregated statistics on age discrimination claims. It is difficult to track how many claims are filed, withdrawn, or abandoned in Australian courts and tribunals. This represents a **substantial gap in the Australian data**. Only 108 age discrimination cases were reported in Australian courts and tribunals from the 1990s to 31 December 2017; claimants were successful in only 12 cases.

In Great Britain, where data is available, age discrimination complaints are significantly less likely than all claims to be successful at hearing, and more likely to be withdrawn. In this study of 1208 UK cases (from February 2017 to 17 April 2019), only 43 claims were successful at hearing. Uncertainty around justification (that is, the ability to objectively justify direct age discrimination as a proportionate means of achieving a legitimate aim) may explain why age claims are commonly withdrawn. However, very few respondents successfully argued at hearing that direct age discrimination was justified (only 1 in this case sample of 1208 cases). Given the very limited use of

justification provisions in practice, it is **timely to reconsider whether direct age discrimination should be able to be objectively justified**.

In both the UK and Australia, men are more likely to proceed to hearing and judgment than women; older workers are more likely to proceed to hearing and judgment than younger workers; and claims are more likely to relate to dismissal than recruitment. Overall, age discrimination cases, with their heavy focus on dismissal, are unrepresentative of how age discrimination is generally experienced at work. Further, in Australia in particular, women are less likely to pursue an age discrimination claim to hearing and judgment, though they are no less likely to make a complaint to an equality agency. The majority of claimants in Australian (73 claimants or 68%) and UK cases (86 of 172 discernible claimants or 50%) were men bringing a claim on the basis that they were perceived as being too old. **There appear to be particular barriers facing women and younger workers in proceeding to a court or tribunal.**

While costs orders are rare in most jurisdictions (except in the Australian federal jurisdiction, where costs follow the event), the fear of costs may have a broader and disproportionate impact in deterring individual claimants. That said, in this sample, most costs orders were made in favour of respondents, and for higher amounts.

Data gaps

The data obtained in this project were often incomplete, contained errors, and tended to be jurisdiction-specific in the way they were reported. Key variables were often missing from the data, making it difficult to analyze questions of intersectionality, particularly due to ethnicity and indigeneity. One of the key findings of this project is the extent to which data on individual discrimination complaints are incomplete, dispersed, potentially inaccurate, and difficult to obtain, across both the UK and Australia. This makes it difficult to evaluate the practical operation of enforcement mechanisms. **Increasing transparency, including through better data collection and communication, is a key reform for advancing age equality in practice.**

Beyond Individual enforcement

Individual claims should remain an important part of any enforcement model. The focus in individual enforcement should be on:

1. creating favourable precedents, which might lead to broader change;
2. generating a ‘critical mass’ of cases, to promote a culture of compliance; and
3. achieving systemic change through individual litigation.

Framing equality rights as human rights may encourage claiming and support a purposive approach to equality law by judges and tribunal members. While a range of reforms can and should be made to individual enforcement, these systems are operating in a workplace context that is likely to inhibit claiming. We therefore also need to **look beyond individual enforcement**.

There are **three practical alternatives** or complements to individual enforcement: strengthening positive duties; bolstering the roles of statutory agencies; and enhancing collective enforcement, whether by trade unions, groups of individuals or the third sector. These alternatives work best alongside improvements to individual enforcement – the reforms are mutually reinforcing and mutually supportive. For example, supporting individual claiming will strengthen agency enforcement; agency enforcement and collective action are key to effective positive duties; and positive duties can help individuals who are impacted by discrimination. These reforms should be seen as a four-fold model of reform, with each change working together and in conjunction with other areas. To be effective, too, these mechanisms must **re-prioritize age and age equality**. This requires a renewed appreciation of how age inequality amplifies and intensifies other forms of inequality.

Strengthening positive duties

Positive equality duties could be an important alternative and addition to the individual enforcement of age discrimination law. **Positive equality duties should be adopted across Australia, and strengthened in the UK.** However, to be effective, positive duties need reform to strengthen four interlocking mechanisms: self-regulation by organizations; consultation and engagement; central scrutiny; and individual enforcement. Positive duties should:

- Apply to both the public and private sectors in their role as employers.
- Require both proper consideration and proportionate action to eliminate discrimination and advance equality of opportunity.
- Require consultation and engagement, and include general principles for how engagement processes should be conducted.
- Be enforceable by a direct cause of action to the relevant tribunal, with the possibility of damages, in a similar jurisdiction to that established under discrimination laws.
- Give equality agencies statutory powers to receive and conciliate complaints relating to positive duties.

Bolstering statutory agencies

Statutory agencies are an essential back-up for securing compliance with equality law; they play a key role in assisting, building capacity, and addressing instances where self-regulation fails. However, statutory agencies currently have limited powers for securing compliance with equality law; indeed, they lack the budgets and staffing to effectively use even their existing powers.

Governments must reprioritize equality, and financially and politically support the work of statutory equality agencies. The advancement of age equality depends on strategic, holistic and integrated enforcement by a strong statutory agency that does not rely on individual complaints for agenda setting. Age must become a renewed priority for equality agencies, recognizing that age compounds and amplifies other forms of inequality, and that failing to address age discrimination will have consequences for all other protected grounds.

Effective agency enforcement requires reform across four areas: expanding agency powers to escalate enforcement in the event of non-compliance, and to support individual claimants; ensuring resourcing and staffing commensurate with the scale and diversity of an agency's responsibilities; prioritization of age equality; and improved public communication and outreach. Agency enforcement should:

- Prioritize the enforcement of age discrimination law.
- Reframe age discrimination complaints as a positive assertion of rights with broader significance
- Focus on evidence-based communication and public outreach, including:
 - o Strategic public messaging and the gathering and communication of data.
 - o Training and outreach programs to promote empathy and understanding for those who are impacted by discrimination.
 - o Better promotion of successful age discrimination claims and cases, including through a register of conciliated outcomes to inform and educate potential claimants.
 - o Organizational capacity building, to better support the implementation of positive duties
 - o Engagement and consultation, particularly with young people and older women.
- Adopt comprehensive data management systems that facilitate data extraction and reporting, to:
 - o Facilitate strategic public messaging and the communication of data.
 - o Monitor complaint outcomes by gender.
 - o Monitor and inform how complainants can be encouraged to progress their claims to conciliation.

- o Enable anonymous reporting of issues online to facilitate intelligence gathering, allowing people to indicate on the form if they want to be contacted.
 - o Enable aggregation and comparison of data at a national level.
- Continue to review the ways in which they promote access to justice, including through the use of accessible language, and by physically opening up premises to the public.
- Encourage parties to settle without a non-disclosure agreement.

Collective action

Collective approaches are important complements to individual enforcement, and offer significant advantages over the individual enforcement model. Collective enforcement of age discrimination law is currently limited: joint, group and representative claims mechanisms are under-utilized; trade unions rarely prioritize age equality; and there is limited social and NGO activity in this space. **There is a need to build a stronger social and collective presence in relation to age equality**, including by supporting NGO activity, and for trade unions to prioritize support for age discrimination complaints.

Reforming age discrimination law: reforms and responsibilities

The study identified key reforms which are the responsibility of governments, statutory agencies, unions, and law societies. I argue for a four-fold model of reform, encompassing reforms to the individual enforcement model, strengthening positive equality duties, bolstering the roles of statutory agencies, and enhancing collective enforcement, whether by trade unions, groups of individuals or the third sector.

For **governments**, I recommend that they:

- Ensure better support and funding of community organizations to advance age equality.
- Establish a specialist equality law program to assist claimants.
- Provide statutory agencies with increased funding, reflecting their broad and complex range of responsibilities, and targeted funding to:
 - o improve data collection and reporting.
 - o enable the strategic exercise of enforcement powers, including by assisting individual complainants.
- Amend equality legislation to:
 - o adopt a more flexible approach to time limits.
 - o more closely regulate the use of non-disclosure agreements in discrimination cases.
 - o clarify or repeal statutory secrecy provisions.
 - o reframe age discrimination complaints as a positive assertion of rights with broader significance.
 - o reinstate the questionnaire procedure in the UK, and adopt it in Australia.
 - o consider introducing qualified, one-way costs shifting, allowing costs to be recovered by claimants only.
 - o adopt a shifting burden of proof in Australia.
 - o explicitly recognize intersectional discrimination.
 - o remove the ability to objectively justify direct age discrimination in the UK, and replace it with more specific exceptions if required.
 - o make reasonable accommodations required for all grounds or protected characteristics, including age.
 - o extend or adopt transparency requirements that include age as a protected characteristic.

- o give statutory equality agencies more extensive powers to escalate enforcement in the event of non-compliance.
 - o give Australian equality agencies powers to assist individual complainants and standing to bring complaints on behalf of individuals.
 - o create a legal duty to consult and engage on equality issues.
- Adopt and strengthen positive duties, that:
 - o Apply to both the public and private sectors in their role as employers.
 - o Require both proper consideration and proportionate action to eliminate discrimination and advance equality of opportunity.
 - o Require consultation and engagement, and include general principles for how engagement processes should be conducted.
 - o Are enforceable by a direct cause of action to the relevant tribunal, with the possibility of damages, in a similar jurisdiction to that established under discrimination laws.
 - o Give equality agencies statutory powers to receive and conciliate complaints relating to positive duties.
- In GB,
 - o increase funding for Acas, to facilitate intensive conciliation in appropriate discrimination matters.
 - o insource the equality helpline to return it to the Equality and Human Rights Commission.
- Adopt a human rights framework in Australian jurisdictions, including equality rights.
- Actively support the adoption of a United Nations Convention on the rights of older persons, and consider how United Nations conventions could better advance the rights of young people.
- Appoint dedicated Commissioners for age equality, with responsibility for advancing equality across all ages.

For **statutory equality agencies**, I recommend that they:

- Reframe age discrimination complaints as a positive assertion of rights with broader significance.
- Develop training and outreach programs to promote empathy and understanding for those who are impacted by discrimination.
- Better promote successful age discrimination claims and cases.
- Continue to build their evidence-based outreach and training activities in relation to age equality.
- Continue to review the ways in which they promote access to justice, including through the use of accessible language, and by physically opening up premises to the public.
- Encourage parties to settle without a non-disclosure agreement.
- Develop and publicize a register of conciliated outcomes to inform and educate potential claimants; and publicly state how matters are selected for inclusion on the register of conciliated outcome.
- Monitor complaint outcomes by gender.
- Consider how complainants can be encouraged to progress their claims to conciliation.
- Adopt comprehensive data management systems that facilitate data extraction and reporting.
- Re-emphasize their role in organizational capacity building, including to better support the implementation of positive duties.
- Enable anonymous reporting of issues via their website to facilitate intelligence gathering, allowing people to indicate on the form if they want to be contacted.
- Review and re-prioritize strategic public messaging and the gathering and communication of data.
- Prioritize the enforcement of age discrimination law.

- Re-focus their efforts on engagement and consultation, including with young people and older women.

For **Australian courts and tribunals**, I recommend that:

- Jurisdictions provide judges and tribunal members with training on how to deal with discrimination matters.
- Federal procedural rules be revised, to provide that those who have standing to bring a complaint to the Australian Human Rights Commission can commence court proceedings.

For **law societies and law schools**, I recommend that:

- Equality law be part of legal education and ongoing professional training for law students, practitioners, judges and tribunal members.

For **legal practitioners**, I recommend that they:

- Seek to limit the scope of non-disclosure agreements in settlements.

For **NGOs and unions**, I recommend that they:

- Actively support the adoption of a United Nations Convention on the rights of older persons, and consider how United Nations conventions could better advance the rights of young people.
- Prioritize support for age discrimination complaints.

For **organizations and employers**, I recommend that they:

- Monitor and proactively address age inequality in the workplace.
- Focus on workplace culture change and initiatives to better value diversity.

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