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# CHAPTER 1: THE ENDURING CHALLENGE OF AGE DISCRIMINATION

## I. Introduction

Age discrimination remains an enduring and prevalent phenomenon at work.[1] Despite the introduction of laws making age discrimination unlawful – some of which have been in place for over 50 years – there appears to have been little shift in workplace age norms. The overarching question for this study, then, is why have age discrimination laws been so ineffective at addressing age discrimination in practice? Is this attributable to the limitations of existing legal frameworks? Does it reflect the ambivalent nature of age discrimination and age discrimination law specifically? Or does it reflect broader challenges with equality law and the individual rights model on which it is based? If the latter, how can we move beyond this model of individual rights and individual enforcement, to reinvigorate age discrimination law?

In this comparative, mixed methods study, I draw on six years of empirical legal research, spanning the United Kingdom (UK), Canada and Australia, to attempt to answer these questions. Using this expansive empirical data, I reflect on the normative role and purpose of age discrimination law – for both older and younger workers – and propose a four-fold programme of reform to address the existing limitations of age discrimination law and its

[1] World Health Organization, 'Global Report on Ageism' (2021) 26–7, 37.

enforcement. This monograph maps the substantial barriers to individual enforcement of age discrimination law, from the initial experience of discrimination itself, all the way to the process of hearing and judgment. These barriers are so significant, and so difficult to surmount, that it is fundamentally unreasonable to depend on individuals to address age inequality at work, even with improvements to the existing legal framework. I therefore put forward three areas in which we can move beyond individual enforcement of age discrimination law, focusing on positive duties, collective action and statutory agencies.

In this chapter, I provide an introduction to and overview of the monograph. The chapter frames the later discussion, drawing on data from the UK, Canada and Australia relating to demographic ageing, the workforce participation rates and work experiences of older and younger workers, and the prevalence and nature of age discrimination in employment. The chapter also puts forward the theoretical framework and method of the monograph.

## II. The Challenge and Opportunity of Demographic Change

Demographic ageing is one of the great success stories of our time. The triumphs of medical technology and public health measures mean people are on average living longer, healthier lives. Those aged 65 and over are steadily increasing as a proportion of the population: in 2018, this group represented 15.6% of the population in Australia, 17.2% in Canada and 18.3% in Great Britain (GB) (Figure 1.1).[2] At the same time, women have gained more control over their reproduction, leading to greater female workforce participation and declining birth rates. These long-term trends are changing the demographic composition and workforce structure of

[2] OECD, 'Elderly Population (Indicator)' (2021) <doi:10.1787/8d805ea1-en> accessed on 3 November 2020.

Organisation for Economic Co-operation and Development (OECD) countries. They offer both incredible opportunities – for longer, better, healthier lives – and exquisite challenges for established work and pension systems.[3]

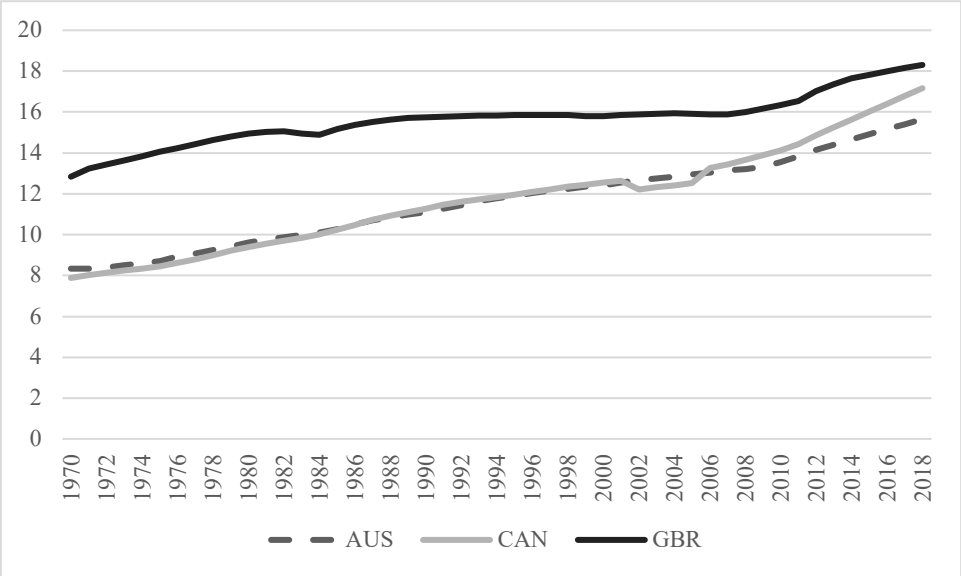


Figure 1.1 Population aged 65+, % of total population, 1970–2018

Source: OECD, 'Elderly Population (Indicator)' (2021) <doi:10.1787/8d805ea1-en> accessed on 3 November 2020

Longer and healthier lives may also mean people can benefit from longer work careers. Age discrimination laws are potentially an important tool to open up job opportunities for people of all ages. Of course, not everyone wants to continue to work into old age; retirement is a relief for those who have worked in physically intensive roles or jobs that are unrewarding. Age discrimination laws could therefore be seen as part of a neo-liberal ploy to keep older workers employed, well beyond the traditional age of retirement.[4] While governments rationalize these

[3] See, eg, Alysia Blackham, 'Pensions and the Modern Workforce' in Sinéad Agnew, Paul S Davies and Charles Mitchell (eds), *Pensions: Law, Policy and Practice* (Hart 2020).

[4] See, eg, John Macnicol, *Neoliberalising Old Age* (Cambridge University Press 2015).

laws on the basis of individual 'choice', this choice is firmly bounded by changes to pension laws, which effectively compel individuals (especially those in low paid work) to keep working.[5] There is a tension, then, between what individuals may desire (for some, retirement and a decent pension), and what governments seek to incentivize (individual 'responsibility', longer work careers and increased tax and pension contributions).[6]

Despite young people and children declining as a proportion of the population in OECD countries,[7] the quality of youth employment remains an enduring and systemic difficulty. Young people are disproportionately affected by precarious and low paid work, workplace accidents, unemployment,[8] and unpaid internships.[9] While this may be partly attributable to broader shifts in the nature of work, away from routine jobs and towards service roles, the historical prevalence and persistence of these trends mean they should be seen as systemic issues, which are unlikely to be rectified with an economic upturn.[10] Indeed, these trends have been substantially exacerbated and intensified by the COVID-19 pandemic, which has led to substantial increases in youth unemployment and under-employment, particularly for young

[5] Alysia Blackham, 'Addressing the Ageing Workforce: A Critical Examination of Legal Policy Objectives and Values' (2017) 37 Ageing & Society 1362, 1383–4.

[6] Ibid, 1383.

[7] OECD, 'Young Population (Indicator)' (2020) <doi: 10.1787/3d774f19-en> accessed on 3 November 2020.

[8] Alysia Blackham, 'Young Workers and Age Discrimination: Tensions and Conflicts' (2019) 48 Industrial Law Journal 1.

[9] Alysia Blackham, 'Working at the Edges of Legal Protection: Equality Law and Youth Work Experience from a Comparative Perspective' in Andrew Stewart and others (eds), *Internships, Employability and the Search for Decent Work Experience* (Edward Elgar 2021).

[10] Blackham, 'Young Workers' (n 8).

women.[11] Thus, at least to some extent, the enduring difficulties faced by young workers may be attributed to less favourable treatment on the basis of age.

## III. Scope and Theoretical Framework

There is a need, then, to consider the way age discrimination continues to manifest at work, and how it can best be addressed, for both older and younger workers. That is the object of this monograph. In the sections that follow, I consider the scope and methods of this work, before considering the ways age discrimination is manifesting at work.

In this study, I have chosen to focus on work for three reasons.[12] *First*, decent or meaningful work has key emotional, health, financial and inclusion benefits for those who are able to participate in it.[13] Thus, securing good work for people of all ages achieves a range of other individual, social and economic benefits.[14] *Second*, most age discrimination complaints relate to work, and age discrimination is commonly reported at work (Chapter 4). Focusing on the workplace therefore offers a larger (yet still relatively manageable) data set for considering

[11] Brendan Churchill, 'COVID-19 and the Immediate Impact on Young People and Employment in Australia: A Gendered Analysis' (2021) 28 Gender, Work & Organization 783.

[12] On other areas of public life, see Alysia Blackham, 'Age Discrimination beyond Employment' (2019) 52 Kobe University Law Review 1.

[13] See, eg, Michael F Steger and Bryan J Dik, 'Work as Meaning: Individual and Organizational Benefits of Engaging in Meaningful Work' in Nicola Garcea, Susan Harrington and P Alex Linley (eds), *Oxford Handbook of Positive Psychology and Work* (Oxford University Press 2009); David L Blustein and others, 'Decent Work: A Psychological Perspective' (2016) 7 Frontiers in Psychology.

[14] AHRC, 'Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability' (2016) 12–13, 44–8.

questions of enforcement. *Third*, and more practically, my focus on work reflects my background as a labour law practitioner and educator.

In considering questions of enforcement and legal efficacy, I use a theoretical framework grounded in reflexive law and regulatory theory. While there are a number of models or theories of this form of regulation – variously called experimentalism, reflexive law, responsive law, regulatory theory, or second-generation regulation – they are united by some key features.

First, these theories de-emphasize command and control regulation, where government *commands* organizations to meet certain standards, and *controls* behaviour with the threat of negative sanctions.[15] This 'first-generation' regulation tends to be grounded in fixed rules prohibiting discrimination, financial penalties for a failure to comply with rules, and a focus on individual enforcement.[16] Negative duties prohibiting discrimination[17] and fixed rules struggle to address structural discrimination,[18] being either too narrow to cover all discriminatory behaviours, or so broad that they create legal uncertainty.[19] Legal uncertainty can lead to organizational 'gestures of compliance' with discrimination law, which are ultimately

[15] Darren Sinclair, 'Self-Regulation versus Command and Control? Beyond False Dichotomies' (1997) 19 Law & Policy 529, 534.

[16] Ibid.

[17] Bob Hepple, 'Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation' (2011) 40 Industrial Law Journal 315, 318.

[18] Susan Sturm, 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101 Columbia Law Review 458, 460.

[19] Ibid, 461.

ineffective at actually addressing discrimination.[20] Command and control regulation is therefore unlikely to lead to reliable organizational change.[21]

Second, then, moving beyond command and control approaches, these theories seek to effect change through second-order effects, via self-regulation and self-scrutiny. For example, reflexive law – grounded in systems theory – posits that legal regulation cannot directly change organizational behaviour: law and organizations occupy discrete sub-systems, which cannot directly interact or communicate.[22] Any communication between systems is mediated by the system's own logic and internal processes for self-reproduction.[23] Law can therefore only 'irritate' other sub-systems;[24] the results of legal change – especially that via command and control regulation – are unpredictable and variable, and legal regulation can have perverse effects.[25] Instead, recognising these limits, reflexive law seeks to harness and work with organizations' own internal processes of self-regulation, and to use regulatory 'irritations' to effect workplace change.[26]

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[20] Ibid.

[21] Neil Gunningham, 'Introduction' in Neil Gunningham and Peter N Grabosky (eds), *Smart Regulation: Designing Environmental Policy* (Clarendon Press 1998) 12.

[22] Niklas Luhmann, *Law as a Social System* (Fatima Kastner and others trs, Oxford University Press 2004).

[23] Gunther Teubner, *Law as an Autopoietic System* (Zenon Bankowski ed, Anne Bankowska and Ruth Adler trs, Blackwell 1993) 62.

[24] Gunther Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18 Law & Society Review 291, 298.

[25] Ibid, 299–300.

[26] Ralf Rogowski and Ton Wilthagen, 'Reflexive Labour Law: An Introduction' in Ralf Rogowski and Ton Wilthagen (eds), *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Kluwer Law and Taxation Publishers 1994) 7.

By contrast, in an experimentalist architecture, change is achieved through 'directly deliberative polyarchy':[27] local actors (such as organizations) are encouraged 'to engage in investigation, information sharing and deliberation' to solve problems,[28] and difficult decisions regarding how to address discrimination are devolved to the local level, accommodating organizational differences.[29] Experimentalism is closely linked to organizational benchmarking[30] and focuses on creating networks of firms that engage in peer review and scrutiny.[31]

Both reflexive law and experimentalism therefore reduce the burden on regulators to monitor organizational compliance: internal processes offer their own form of replication and scrutiny of organizational behaviour, by encouraging organizations to self-diagnose and self-correct discriminatory processes.[32] These theories therefore offer innovative alternatives to command

[27] Charles F Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' in Charles F Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press 2012) 3.

[28] Charles F Sabel and William H Simon, 'Minimalism and Experimentalism in the Administrative State' (2011–12) 100 Georgetown Law Journal 53, 81.

[29] Ibid, 56.

[30] See Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267.

[31] Joshua Cohen and Charles Sabel, 'Directly-Deliberative Polyarchy' (1997) 3 European Law Journal 313, 327.

[32] Sabel and Simon (n 28) 88.

and control regulation, via a focus on organizational problem-solving, learning, reform and innovation.[33]

Third, though, these theories see effective 'second generation' regulation as demanding certain institutional structures and preconditions. They all see the state as having a role to play in regulation, focus on organizational self-regulation or problem-solving, and involve stakeholders in the problem-solving process.[34] For example, Hepple argues that the successful deployment of reflexive law requires three 'interlocking mechanisms': internal scrutiny by and of the organization; the involvement of interest groups through participation and consultation; and an external agency to assist, build capacity and address instances where self-regulation fails.[35]

Similarly, experimentalist organizational deliberation occurs within a specific architecture, highlighting the role of both central institutions (such as government agencies, legislatures and/or courts), and local institutions (such as employers) in achieving change. In this experimentalist regulatory model, framework goals and measurement criteria are set and revised through joint action between central and lower units;[36] lower-level units report on their performance against agreed goals; and central units monitor performance, pool information, and promote 'aggregate learning' between different local units via a process of 'deliberative

[33] See, eg, Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press 2002).

[34] Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28 Sydney Law Review 689, 710.

[35] Hepple, 'Enforcing Equality Law' (n 17) 321.

[36] Sabel and Zeitlin (n 27) 3. See also Sabel and Simon (n 34) 79.

engagement'.[37] Experimentalism combines decentralised control as to how goals are to be achieved with centralised coordination of monitoring and evaluation,[38] as part of an iterative cycle.

Thus, while the burden on regulators is reduced, they still perform essential functions. Enforcement must be able to escalate in the case of non-compliance, to support and reinforce self-regulation.[39] In accordance with the 'enforcement pyramid', regulatory intervention moves progressively from 'restorative dialogue', information and persuasion; to internal organizational scrutiny (such as via positive duties); to individual complaints; to agency inquiry and investigation; to compliance notices; to agreements; to sanctions, and (in some systems) criminal penalties.[40] The final step is incapacitation, recognising that repeated non-compliance is often due to a lack of capacity to comply.[41] The enforcement pyramid is complemented by a support pyramid, which focuses on capacity-building (Figure 1.2[42]). For Braithwaite, 'Strengths expand to absorb weaknesses';[43] the emphasis of regulatory activity should therefore be on capacity building, rather than enforcement:[44]

[37] Sabel and Simon (n 28) 55.

[38] Ibid, 79.

[39] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992).

[40] Hepple, 'Enforcing Equality Law' (n 17).

[41] John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 University of British Columbia Law Review 475, 485.

[42] Based on ibid, 482; Hepple, 'Enforcing Equality Law' (n 17); Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44 Federal Law Review 311.

[43] Braithwaite, 'The Essence of Responsive Regulation' (n 41) 480.

[44] Ibid.

> The first idea, therefore, is to move up a pyramid of supports that allows strengths to expand to solve more and more problems of concern to the regulator; when that fails to solve specific problems sufficiently, the regulator … starts to move up a pyramid of sanctions.[45]

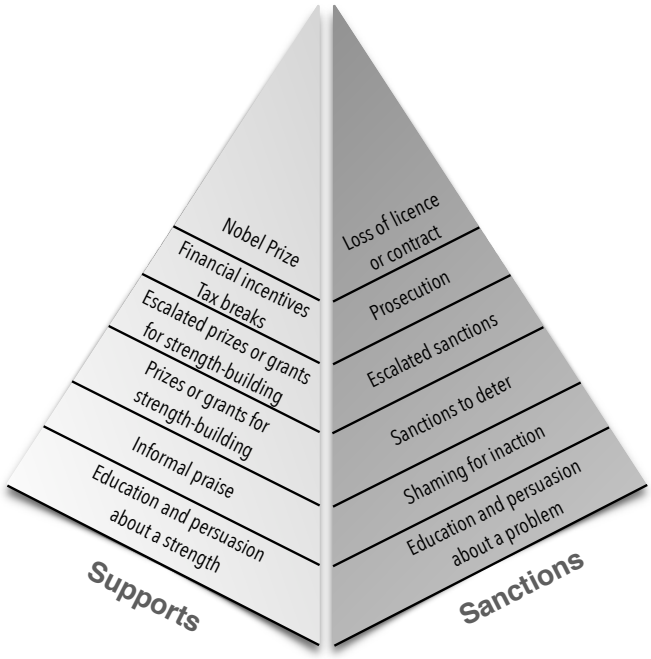


Figure 1.2 Pyramid of supports and sanctions

The enforcement pyramid – while compelling in its design and simplicity – focuses on state regulatory action, at the expense of depicting the other 'interlocking mechanisms' of internal scrutiny and involvement of interest groups.[46] It does not show how the actions of different regulatory actors can combine or interact to effect regulatory action.[47] Grabosky therefore

[45] Ibid, 481.

[46] PN Grabosky, 'Discussion Paper: Inside the Pyramid: Towards a Conceptual Framework for the Analysis of Regulatory Systems' (1997) 25 International Journal of the Sociology of Law 195, 197.

[47] Ibid.

proposes a three-dimensional pyramid (a triangular prism), with facets depicting state regulation (the 'enforcement pyramid'); self-regulation (encompassing industry associations); and the role of third parties or interest groups.[48] Regulatory actions, then, exist within the pyramid, being located according to their sponsor(s) and degree of coerciveness.[49] Alternatively or additionally, state regulators could use network partners to escalate or extend the reach of enforcement activity ('networked escalation').[50]

It is not always easy to 'fit' equality law into a reflexive or responsive framework, though many scholars have attempted to do so.[51] As Braithwaite argues, the point is to view responsive regulation 'not as rocket science but as a natural social process',[52] with a focus on unlearning adversarialism and threat-making, in favour of a more respectful, natural form of engagement.[53] Thus, it is inconsequential that equality law does not map precisely onto the enforcement pyramid; the point, more generally, is that sanctions should escalate to become more coercive with non-compliance.

In existing legislative models of equality law, the bulk of enforcement action is undertaken by individual claimants pursuing legal rights (Chapter 3). In Braithwaite's model, 'passive

[48] Ibid, 198.

[49] Ibid, 200.

[50] Braithwaite, 'The Essence of Responsive Regulation' (n 41) 508, 510.

[51] Hepple, 'Enforcing Equality Law' (n 23); Smith, 'Not the Baby and the Bathwater' (n 34); Allen, 'Barking and Biting' (n 42). For detailed consideration, see Alysia Blackham, 'Re-Systematising Labour Law: Beyond Traditional Systems Theory and Reflexive Law?' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World: Towards Inclusive Labour Law* (Hart 2019).

[52] Braithwaite, 'The Essence of Responsive Regulation' (n 41) 519.

[53] Ibid.

responsibility' (holding actors responsible for past wrongs) is only resorted to when 'active responsibility' is not possible (that is, making actors take responsibility to make things right in the future).[54] This compares markedly to the individual enforcement model in equality law. Thus, second generation regulation is perhaps better seen as an aspirational model for existing legal frameworks.[55]

However, if we sought to somehow integrate this focus on individual enforcement as part of a model of second-generation regulation, individual claimants could be depicted as third parties, occupying a pyramid face with other third parties and interest groups.[56] Alternatively, individual legal action could form a fourth face of the pyramid, representing the pyramid of disputes (Chapter 3).[57]

Overall, then, consolidating these ideas, we are essentially considering a pentagonal pyramid of enforcement, with five sides respectively depicting state sanctions (the 'enforcement pyramid'); state supports; self-regulation; third parties or interest groups; and individual disputes. The simplicity of the enforcement pyramid is long gone.

Reflexive law, and systems theory on which it is based, have been the subject of a number of substantial critiques in the context of equality law.[58] I have questioned elsewhere whether this

[54] Ibid, 510.

[55] Hepple, 'Enforcing Equality Law' (n 17).

[56] Grabosky (n 46) 198.

[57] See, eg, Laura Beth Nielsen and Robert L Nelson, 'Scaling the Pyramid: A Sociolegal Model of Employment Discrimination Litigation' in Laura Beth Nielsen and Robert L Nelson (eds), *Handbook of Employment Discrimination Research: Rights and Realities* (Springer 2005).

[58] See Blackham, 'Re-Systematising Labour Law' (n 51).

reflects the imperfect implementation of reflexive law; or more fundamental issues with reflexive law and systems theory themselves.[59] A fundamental challenge with reflexive law is that it is relatively ineffective at addressing disparities of power, including in consultation and engagement processes.[60] Manfredi and others argue:

> reflexive regulation does not address deep structural inequalities and the inequality of power relations operating within organisations. Instead, as with other forms of second-generation regulation, the implementation of social tasks that should be the concern of the state, such as the development of institutional equality, is externalised to become an internal organisational interest, albeit within the public sector.[61]

Thus, reflexive law may fail to address or even 'reinforce the neo-liberal turn in economic policies which may be at the root of inequality'.[62] Any model of second-generation regulation must therefore be constantly attuned to the way in which power is replicated, reinforced or hidden through regulatory techniques. While recognising these limitations, in this research I use a theoretical framework grounded in reflexive law and regulatory theory, as a lens for critiquing the enforcement and legal efficacy of age discrimination laws.

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[59] Ibid.

[60] See, eg, Hepple, 'Enforcing Equality Law' (n 17) 323.

[61] Simonetta Manfredi, Lucy Vickers and Kate Clayton-Hathway, 'The Public Sector Equality Duty: Enforcing Equality Rights Through Second-Generation Regulation' (2018) 47 Industrial Law Journal 365, 376.

[62] Ibid, 377.

## IV. Method

This study employed an empirical mixed methods research design, synthesising qualitative, quantitative, doctrinal and comparative research methods. Comparative legal doctrinal research, spanning the UK, Canada and Australia, is complemented by empirical case studies of enforcement in the UK and Australia.

***Mixed methods research*** meaningfully combines or integrates – *mixes* – qualitative and quantitative research methods to understand a research problem.[63] The aim of this mixing is to make use of the different strengths and advantages of qualitative and quantitative research methods,[64] thereby increasing research validity[65] and enriching understanding of a topic.[66] I have written more about mixed methods – and my rationale for using this design – in my previous work.[67] More particularly, this study draws on comparative legal doctrinal research, content analysis, quantitative data analysis, qualitative expert interviews, and a survey of advocates.[68]

[63] Vicki L Plano Clark and others, 'Mixing Quantitative and Qualitative Approaches: An Introduction to Emergent Mixed Methods Research' in Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Handbook of Emergent Methods* (Guilford Press 2008) 364.

[64] Michael Quinn Patton, *Qualitative Evaluation and Research Methods* (2nd edn, Sage 1990) 13.

[65] Jerome Kirk and Marc L Miller, *Reliability and Validity in Qualitative Research* (Sage 1986) 30.

[66] Jennifer C Greene, Valerie J Caracelli and Wendy F Graham, 'Toward a Conceptual Framework for Mixed-Method Evaluation Designs' (1989) 11 Educational Evaluation and Policy Analysis 255, 258.

[67] Alysia Blackham, *Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice* (Hart Publishing 2016) ch 2.

[68] Research materials used in this study are available on the project website: <ageworks.info>.

***Legal doctrinal research*** involves the hermeneutic study of legal texts.[69] It is a 'two-part process', involving both identification[70] and interpretation of texts.[71] Legal doctrinal method is essentially a search for coherence across legal texts, combining 'specific interpretations of legal principles, rules and concepts in a (newly) systematised whole'.[72] As van Hoecke argues, however, 'coherence' is not innate or intrinsic to legal texts[73] – hermeneutic analysis must be complemented with empirical analysis and normative decision-making to find legal 'meaning'.[74] Thus, legal doctrinal research and empirical research are not so far removed.

This study draws on ***comparative*** legal doctrinal research, spanning the UK, Canada and Australia. Given the UK, Canada and Australia share a common legal tradition, and have framed their equality laws on an individual rights model, there is significant scope for mutual learning between the jurisdictions. Explanatory comparative legal analysis, then, seeks to identify similarities and differences between jurisdictions, and account for these variances.[75] My interest in these jurisdictions reflects what Örücü describes as a 'problem-solving' or

[69] Mark van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart 2011) 17.

[70] Texts might include normative cases, legislation and treaties and authoritative non-binding cases and scholarly writings: ibid, 11.

[71] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 110.

[72] van Hoecke (n 69) 17.

[73] Ibid, 3, 6.

[74] Ibid, 10.

[75] Maurice Adams, 'Doing What Doesn't Come Naturally: On the Distinctiveness of Comparative Law' in Mark van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart 2011) 237.

sociological approach to comparative law, examining how different legal systems have responded to similar problems in contrasting ways: here, age discrimination at work.[76] The fact that these jurisdictions are facing a similar problem warrants the comparison;[77] differences in national context increase the potential for mutual learning.[78]

In additional to doctrinal analysis, this study uses ***qualitative and quantitative content analysis*** to analyse age discrimination cases in the UK and Australia.[79] Unlike doctrinal analysis, which aims to harmonise or systematise texts, content analysis focuses on themes in texts.[80] This approach is apt where there are many decisions of a similar precedential weight (i.e. many first instance decisions, as in discrimination law) and where we are concerned with the *pattern* across cases, rather than a nuanced and deep understanding of one case.[81] What matters for content analysis is the collective – not individual – insights from cases.[82]

In Australia, my universe of documents for analysis included all judgments relating to age discrimination, including those under discrimination legislation and industrial relations

[76] Esin Örücü, 'Developing Comparative Law' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 52.

[77] Ibid.

[78] Dagmar Schiek, 'Enforcing (EU) Non-Discrimination Law: Mutual Learning between British and Italian Labour Law?' (2012) 28 International Journal of Comparative Labour Law and Industrial Relations 489, 508.

[79] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 941.

[80] See van Hoecke (n 69) 11–17.

[81] Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California Law Review 63, 66.

[82] Ibid, 76.

legislation (including unfair dismissal law where age was alleged to be a factor in the dismissal) handed down in all Australian jurisdictions, from the commencement of age discrimination legislation in Australia until 31 December 2017. The refined sample included 108 decisions.[83]

In the UK, I analysed all Employment Tribunal (ET) decisions relating to age discrimination published on the GOV.UK ET decisions website, from the first decisions being uploaded to the website (February 2017) until 17 April 2019,[84] and decisions uploaded to the NI tribunal website over the same period.[85] Data were updated for the case numbers within the sample to reflect all case developments up to 11 January 2020. Cases were compared and linked to those heard in the Employment Appeal Tribunal (EAT) and Court of Appeal, to include subsequent case developments. The UK sample included 1208 age discrimination cases and 1563 published decisions, covering 7,829 pages.

Cases with multiple decisions (for example, a preliminary hearing and/or on appeal) were only considered once, aggregating the issues for consideration. Decisions were coded manually

[83] This method and sample selection is discussed in detail elsewhere: Alysia Blackham, 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42 Sydney Law Review 1.

[84] GOV.UK, 'Employment Tribunal Decisions' <https://www.gov.uk/employment-tribunal-decisions> accessed 27 February 2017. Some decisions handed down earlier than February 2017 had been uploaded to the website, dating back to 14 July 2016. These decisions were included for the purposes of this analysis, adding four decisions to the sample which were decided prior to February 2017. I have written in detail elsewhere about how this sample was refined and analysed: Alysia Blackham, 'Enforcing Rights in Employment Tribunals: Insights from Age Discrimination Claims in a New "Dataset"' (2021) 41(3) Legal Studies 390.

[85] Northern Ireland Office of Industrial Tribunals and Fair Employment Tribunals, 'Decisions Search' (28 September 2006) <https://employmenttribunalsni.co.uk/OITFET_IWS/DecisionSearch.aspx> accessed 27 April 2021.

using themes derived from the literature and the documents themselves,[86] and analysed using qualitative and quantitative methods.[87]

***Quantitative data analysis*** was used at various points in this study to analyze the prevalence and outcomes of age discrimination claims. These analyses used both publicly available data from statutory agencies (such as that included in annual reports), and additional data sourced through FOI requests and by liaising with the agencies themselves. Data were collected and updated to the point of writing (June 2020).

Gathering and collating this data was one of the more onerous aspects of this project. Equality agencies do not publicly report on many aspects of their operations, due to onerous secrecy obligations imposed by their founding statutes, budget cuts, and the extensive use of non-disclosure agreements (NDAs) in conciliated equality disputes.[88] Within these limits, statutory equality agencies retain substantial discretion in determining what and how they report on data. In many cases, data on age discrimination claims were not collected centrally[89] or were collected by a different body,[90] numbers of complaints were too small to provide detail beyond

[86] Gery W Ryan and H Russell Bernard, 'Data Management and Analysis Methods' in Norman K Denzin and Yvonna S Lincoln (eds), *Collecting and Interpreting Qualitative Materials* (2nd edn, Sage 2003) 275–6.

[87] Further details of these methods and results are on file with the author and available on request.

[88] Dominique Allen and Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the UK' (2019) 43 Melbourne University Law Review 384. See also Women and Equalities Committee, 'The Use of Non-Disclosure Agreements in Discrimination Cases' (2019) Ninth Report of Session 2017–19 HC 1720.

[89] Federal Court of Australia (FCA), Federal Circuit Court of Australia (FCCA), Fair Work Commission (FWC), Victorian Civil and Administrative Tribunal (VCAT).

[90] UK Equality and Human Rights Commission (EHRC) and Equality Advisory and Support Service (EASS).

that in the annual report,[91] there were inconsistencies in how individual consents to participate in research were noted centrally,[92] data were promised but not provided[93] or concerns were expressed about how data were recorded and its consistency.[94]

After over four years of negotiation, I managed to obtain long-term, detailed complaint and conciliation data for only three jurisdictions: Queensland, Western Australia (WA) and South Australia (SA). To comply with statutory secrecy obligations, the equality agencies de-identified all conciliation records, so no personally identifiable information was provided. I obtained additional, less expansive data from Acas (the Advisory, Conciliation and Arbitration Service), the Equality Advisory and Support Service (EASS), the Australian Human Rights Commission (AHRC), Tasmania and the Fair Work Ombudsman (FWO).

The data I obtained are often incomplete, contain errors, and jurisdiction-specific in the way they are reported. Key variables are often missing from the data, making it difficult to analyze questions of intersectionality, particularly due to ethnicity and indigeneity. Rather than applying complex statistical models, I have used descriptive statistics to analyze data as and where relevant.

One of the key findings of this project, then, 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

[91] Northern Territory (NT).

[92] New South Wales (NSW).

[93] Victoria (Vic).

[94] South Australia (SA), UK Advisory, Conciliation and Arbitration Service (Acas).

operation of enforcement mechanisms. Increasing transparency, including through better data collection and communication, is a key reform for advancing age equality in practice.[95]

To complement this limited quantitative data, ***semi-structured qualitative expert interviews*** were conducted across the Australian states and territories, and the UK nations. A first series of ten pilot interviews was conducted with 12 respondents in New South Wales (NSW) and Victoria in July 2015, to develop the themes and scope of this project. A second series of interviews was conducted across all Australian states and territories and the UK nations between March 2018 and September 2020.[96]

'Experts' were defined as those who were actively involved in the enforcement of age discrimination law, as it related to work.[97] Experts were sampled purposively[98] by approaching agencies and individuals who had key roles in the enforcement of age discrimination law, as identified from the legal framework, government reports, and searches of internet databases. Respondents included representatives from equality bodies, legal practice, age lobby groups, government, unions and academia. Over time, theoretical sampling was used to identify further

[95] Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) Law in Context 98.

[96] Five organizations were interviewed in both the pilot interviews and the subsequent interviews; however, in the intervening period, all respondent officeholders in these organizations had turned over, meaning the interviews were with different individuals at each time point. Both the pilot and subsequent interviews were therefore included in the data analysis.

[97] Michael Meuser and Ulrike Nagel, 'The Expert Interview and Changes in Knowledge Production' in Alexander Bogner, Beate Littig and Wolfgang Menz (eds), *Interviewing Experts* (Palgrave Macmillan 2009) 24.

[98] Robert Stake, 'Qualitative Case Studies' in Yvonna Lincoln and Norman Denzin (eds), *Strategies of Qualitative Inquiry* (3rd edn, SAGE 2008) 130.

respondents who were likely to extend or further develop emerging concepts and theory,[99] and snowball sampling[100] was used to expand the pool of respondents.[101]

Some community legal centres and practitioners declined to be interviewed, on the basis that they were not actively involved in age discrimination matters. I was also unable to secure an interview with the Labour Relations Agency (LRA) in NI. ET judges were not interviewed in GB, as judicial participation in research projects will only be approved if judicial participation is deemed 'necessary'.[102] Given the publicly available data on these issues, ET judges' perspectives are arguably not 'necessary' to corroborate the findings of this study.

In total, 68 expert interviews were conducted with 101 respondents, as depicted in Table 1.1 and Table 1.2. Interviews were mostly conducted in person, though phone and Zoom interviews were conducted if in person meetings could not be arranged (including during the COVID-19 pandemic). Where necessary or expedient, group interviews were conducted, such as when interviewing equality agencies or community legal centres with multiple people involved in age discrimination matters. As Table 1.1 demonstrates, some jurisdictions were overrepresented in the sample (such as England and Victoria): this, in part, reflected where

[99] Kathleen M Eisenhardt, 'Building Theories from Case Study Research' in A Michael Huberman and Matthew Miles (eds), *The Qualitative Researcher's Companion* (Sage Publications 2002) 13; Juliet M Corbin and Anselm L Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage Publications 2008) 117.

[100] That is, where experts identify other potential respondents.

[101] Tim May, *Social Research: Issues, Methods and Process* (Open University Press 1993) 100; Webley (n 85) 934.

[102] Courts and Tribunals Judiciary, 'Judicial Participation in Research Projects' (15 August 2019) <https://www.judiciary.uk/publications/judicial-participation-in-research-projects/> accessed 16 June 2020.

agencies and practitioners were active in age discrimination law (and, conversely, where there was minimal activity, and/or respondents did not agree to be interviewed, such as in Queensland and SA).

| Jurisdiction | Number of interviews | Number of respondents |
|---|---|---|
| England | 10 | 11 |
| NI | 5 | 6 |
| Wales | 4 | 9 |
| Scotland | 6 | 9 |
| Tasmania | 4 | 10 |
| WA | 4 | 5 |
| NT | 4 | 7 |
| ACT | 6 | 7 |
| NSW | 6 | 7 |
| Victoria | 11 | 17 |
| Queensland | 1 | 2 |
| Federal | 5 | 7 |
| SA | 1 | 4 |
| **Total** | **68** | **101** |

***Table 1.1*** *Interviews and respondents by jurisdiction*

| Respondent type | Number of interviews | Number of respondents |
|---|---|---|
| Agency | 27 | 46 |
| Practitioner | 19 | 26 |
| Academic | 1 | 1 |
| Government | 3 | 4 |
| Union | 3 | 3 |
| NGO | 15 | 21 |

***Table 1.2*** *Number of interviews by respondent type*

Interviews were conducted with non-directive questions and a broad topic guide, and typically lasted for an hour. Respondents were asked their views on the effectiveness of the enforcement of age discrimination legislation, barriers and limitations to the enforcement of age discrimination law (for both older and younger workers), and suggestions for law reform and change. Interviews were recorded and transcribed; content analysis was then used to categorise key patterns in the data.[103] Transcripts were inductively coded, using themes derived from the literature and the transcripts themselves,[104] with the assistance of NVivo qualitative data analysis software. Data were anonymised and each interview allocated an identifier in accordance with a classification scheme.[105] Respondents were invited to review and check how

[103] Patton (n 64) 381.

[104] Ryan and Bernard (n 86) 275–6.

[105] Stephen McNair, Matthew Flynn and Nina Dutton, 'Employer Responses to an Ageing Workforce: A Qualitative Study' (Research Report 455, 2007) 161–2. Interviewees have been classified according to their jurisdiction: A for Australia, UK for the UK, then allocated a number.

their responses were being reported, and to amend information to ensure fairness, accuracy or relevance;[106] one substantive change was made through this process.

To complement this qualitative data, I conducted a ***survey of advocates*** to gather a broader range of perspectives on how age discrimination law is operating in practice. The survey sought qualitative and quantitative data about practitioners' and advocates' experiences in the enforcement of age discrimination law, their opinions regarding any barriers to enforcement, and possible legal reforms. It was conducted using Qualtrics survey software. Respondents were not required to answer every question on the survey.

The survey was distributed in June 2020 to legal practitioners and industrial advocates operating in the UK and Australia. Individual practitioners working in the area of age discrimination law were identified from the analysis of ET decisions and Australian case law. Where practitioners had a publicly accessible email address (153 UK practitioners, 67 Australian practitioners), a link to the survey was sent directly to them.[107] In many cases (78 UK practitioners, six Australian practitioners), public emails were generic email addresses, or emails for barristers' clerks. In this case, clerks, law firms or chambers were contacted and asked to pass the survey link on. A survey link was also sent to 295 law societies, bar associations and community legal centres, unions and industrial advocates in Australia and the UK for distribution. A public call for respondents was also made on Twitter.

[106] See Helen Simons, *Case Study Research in Practice* (SAGE 2009) 102–3.

[107] This meant many barristers were contacted directly, as barristers were more likely than solicitors to list their email publicly.

In total, 76 survey responses were received between June and September 2020. Of those who identified their jurisdiction (41 respondents), 27 respondents were based in Australia (seven in Victoria, 12 in NSW, two in SA, and six in Queensland), and 14 in the UK; of respondents who identified their gender (37), 17 identified as female and 20 as male. The majority (33 of 41 responses) regularly represented claimants or workers; eight represented employers or respondents. Of those who identified their professional role (37), most were barristers (27), though respondents also included union officials (2), other legal practitioners (7) and a Tribunal member.

This study synthesizes multiple, overlapping and mutually enriching sources of data. While recognizing the limits of each of these methods – which are all partial, incomplete, and limited in different ways – this study aims to make use of the different strengths and advantages of qualitative and quantitative research methods, to enrich our understanding of how age discrimination law is operating in practice.

Using these mixed methods, we can turn to consider the ways in which age discrimination continues to affect both older and younger workers, and why we might question the success of existing age discrimination laws at effecting change. The enduring prevalence of age discrimination at work presents a strong case for critique and reform of the legal framework; indeed, the very nature of age discrimination may make existing models of enforcement problematic.

## V. The Enduring Prevalence of Age Discrimination

There is a general perception that age discrimination in employment remains common. Butler defines age discrimination or ageism as 'prejudice by one age group toward other age groups.'[108] However, ageism and ageist sentiment can also be internalised, so that individuals make assumptions about their *own* age group. Age discrimination is often grounded in age norms, or widely shared judgments of the standard or typical ages of individuals holding a role or status.[109] Age norms are still firmly entrenched in society, as age continues to be a category deployed to help make sense of the world.[110] Where individuals breach these age norms, they may experience less favourable or unfair treatment. The endurance of age norms means that age discrimination is often taken less seriously than other forms of discrimination; indeed, age is often treated less favourably than other protected grounds in discrimination law itself, with broader exceptions and wider defences to the statutory prohibition of discrimination.[111]

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[108] Robert N Butler, 'Age-Ism: Another Form of Bigotry' (1969) 9 Gerontologist 243, 243.

[109] BS Lawrence, 'Organizational Age Norms: Why Is It so Hard to Know One When You See One?' (1996) 36 Gerontologist 209, 209.

[110] John Macnicol, 'Dilemmas of Age Discrimination' (Paper presented at the Third International Conference on Policy Transferability, Aix-en-Provence, France, September 2002) 16, quoted in Colin Duncan, 'The Dangers and Limitations of Equality Agendas as Means for Tackling Old-Age Prejudice' (2008) 28 Ageing & Society 1133, 1146.

[111] Blackham, *Extending Working Life* (n 67); Alysia Blackham, 'A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK' (2018) 41 Melbourne University Law Review 1085; Alysia Blackham, 'Defining "Discrimination" in UK and Australian Age Discrimination Law' (2018) 43 Monash University Law Review 760.

Australian survey evidence indicates that age discrimination is widespread in Australian workplaces. In a 2014 prevalence survey of age discrimination in the workforce, based on telephone interviews with 2,109 Australians aged 50 years and over, the AHRC found that 27% of respondents reported experiencing age discrimination in employment in the previous two years.[112] Further, 32% of respondents were aware of other people experiencing discrimination because of their age in the workplace in the last two years.[113] Age discrimination was more commonly experienced by those aged 55–9 (31% of respondents) and 60–4 (32%) than by those aged 65 and older (20%);[114] and more likely to be experienced by those seeking paid work (58%) than by those who worked for a wage or salary (28%) or who were self-employed (26%).[115] Of those who experienced discrimination, two thirds (65%) were explicitly told that their age was the reason for the treatment they experienced.[116] Eighty per cent of respondents who experienced discrimination reported a negative impact as a result;[117] for many, this negative impact related to a loss of self-esteem, decline in mental health or increase in stress (60%); others reported a negative impact on family, career or finances (54%).[118] The AHRC

[112] AHRC, 'National Prevalence Survey of Age Discrimination in the Workplace: The Prevalence, Nature and Impact of Workplace Age Discrimination amongst the Australian Population Aged 50 Years and Older' (2015) 18. Respondents were asked: 'during 2013 and 2014, have you at any time during those two years, been treated less favourably than other people in a similar situation because of your age or because of assumptions made about older people?': ibid, 79.

[113] AHRC, 'National Prevalence Survey' (n 112) 23.

[114] Ibid, 18.

[115] Ibid, 19.

[116] Ibid, 35.

[117] Ibid, 45.

[118] Ibid, 46.

has therefore found that age discrimination is a pervasive, systemic, damaging and often accepted part of Australian workplace culture.

In our analysis of the 2014 General Social Survey (GSS) conducted by the Australian Bureau of Statistics (ABS),[119] Temple and I found that, of all respondents reporting discrimination, age was the second most common ground reported (at 21.3%), after country of birth (a composite variable which included race, ethnicity, language and skin colour) (34.4%).[120] In relation to age discrimination specifically, those aged 60 and over were most likely to report discrimination on the basis of age (at 38.4%), though age discrimination was also common among those aged 18 to 34 (21.1%) and 35 to 59 (16.9%) (Table 1.3). Age discrimination was slightly more likely to be reported by women, those born in Australia, those with a disability, heterosexuals and non-parents.

[119] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43 UNSW Law Journal 773.

[120] Though note the large number of 'other', at 48.6%.

| | | Age Discrimination Reported (%) |
|---|---|---|
| **Age** | 18–34 | 21.1 |
| | 35–59 | 16.9 |
| | 60+ | 38.4 |
| **Sex** | Male | 19.7 |
| | Female | 22.7 |
| **Country of Birth** | Australia | 24.7 |
| | MESB | 22.2 |
| | NESB | 11.7 |
| **Disability** | No | 19.9 |
| | Yes | 23.7 |
| **Heterosexual** | No | 20.4 |
| | Yes | 21.5 |
| **Parent** | No | 22.6 |
| | Yes | 19.7 |
| **All** | | 21.3 |

***Table 1.3*** *Age Discrimination Reported, by Demographic Characteristics (%)*

*Source:* 2014 GSS

*Table notes:*

MESB = Mainly English-Speaking Background countries

NESB = Non-English Speaking Background countries

For those reporting age discrimination, the most common context reported was at work (63.8%), though the majority (57%) of those reporting age discrimination report experiencing

it in multiple contexts. The GSS offers high quality evidence of the enduring prevalence of age discrimination in Australian workplaces.

Similar results have been found in the UK. In Britain, for example, a 2017–18 national survey of prejudice canvassing 2,853 adults (using NatCen Panel surveys and an additional survey to capture minority groups) found that age discrimination was the most common form of prejudice British adults reported experiencing, affecting 26% of respondents (though this was not confined to the workplace).[121] Those under 35 were more likely to report experiencing age prejudice (39% of respondents) than those aged 35–54 (22%) or over 55 (20%).[122] Nearly half of all respondents (46%) who had experienced prejudice had done so in employment or at work.[123] At the same time, though, across all respondents, over half (54%) thought that the issue of age discrimination was not at all or only slightly serious.[124]

Of course, self-reported discrimination does not necessarily reflect the actual prevalence of discrimination in society:[125] the difficulty of perceiving discrimination can mean that individuals underreport discrimination.[126] Further, individuals often assume that workplace practices prevent discrimination, and guarantee equal opportunities, reducing their tendency to

[121] Dominic Abrams, Hannah Swift and Diane Houston, 'Developing a National Barometer of Prejudice and Discrimination in Britain' (Research Report 119, 2018) 22, 24.

[122] Ibid, 25.

[123] Ibid, 27.

[124] Ibid, 28.

[125] Ralph Fevre, Heidi Grainger and Rioch Brewer, 'Discrimination and Unfair Treatment in the Workplace' (2011) 49 British Journal of Industrial Relations s207.

[126] Ibid, s212.

report discrimination:[127] Fevre and others describe this as a 'belief in the benign effects of instrumental rationality in the workplace'.[128] This may mean that large-scale surveys significantly understate the prevalence of discrimination in society. Overall, though, while it is difficult to assess the prevalence of age discrimination, it appears that a sizeable proportion of workers experience age discrimination in employment, flagging the importance of effective mechanisms to address and remedy discrimination.

Supplementing this statistical data, the expert interviews conducted in this study reveal telling insights about how age discrimination is manifesting in the workplace. Age discrimination is seen as the biggest issue facing older workers at work;[129] indeed, experiencing age discrimination is a close to universal experience for those who are older: 'we go to the senior's expo and everybody who walks past us has got the basis for a complaint about something'.[130] Age discrimination is subtle and rarely overt,[131] occurring across the life-cycle of employment, from recruitment to termination.

Age discrimination was seen as common in recruitment,[132] affecting both older and younger workers. In some cases, age discrimination was imported into recruitment processes through ostensibly age-neutral criteria, like 'experience'. While these criteria can be legitimate, they

[127] Ibid, s222.

[128] Ibid, s227–8.

[129] UK81.

[130] A105.

[131] A10; A100; A101; A102; A103; A113; A150; A153; UK78; UK84. Cf UK80; UK81.

[132] A5; A10; A98; A102; A113; A156; UK80; UK162.

can also be a cloak for age discrimination: 'Experience is really just a synonym for time'.[133] Issues could be encountered in recruitment if applicants did not fit the stereotype of those who perform that particular job (for example, dental hygienists tend to be young, attractive women).[134] This flags the particular challenges faced by older women in recruitment, as they experience the double jeopardy of age and gender discrimination (Chapters 2 and 4).

To some extent, difficulties in recruitment could reflect a skills mismatch between what employers require and what non-prime age workers are able to offer. For older workers, particular issues can arise where people have worked in manual industries throughout their career, but no longer have the physical capacity to maintain a manual role,[135] or such industries have shut down.[136] These workers are expected to be technologically literate to obtain a new role[137] or to 'retool':[138] 'you are sort of left out or an expectation about teaching yourself all these skills and you can't.'[139] Upskilling is seen as an individual responsibility;[140] lower-skilled workers are rarely seen by employers as 'people to develop, they're just seen as a resource'.[141] For younger workers, employers may not recognize or value the skills that they bring to a particular role.[142]

[133] A159.

[134] A106.

[135] A109.

[136] A110.

[137] UK84; UK152.

[138] A110.

[139] UK84.

[140] UK152.

[141] A110.

[142] A156; A159.

Within work, age discrimination manifests as a lack of voice[143] and invisibility, for both older and younger workers.[144] Age-based stereotypes are pervasive within the workplace,[145] seeing younger workers as lazy,[146] and regarding older workers as having poor information technology (IT) skills, an inability or unwillingness to learn,[147] 'just going through the motions',[148] or making assumptions that skills or capacity will decline with age.[149]

These stereotypes can be conscious or unconscious;[150] regardless, they have a substantial impact on older and younger workers' experiences at work. Age-based stereotypes mean employers often invest less in older workers,[151] meaning older workers have more limited access to training and skills development than their younger peers.[152] In some cases, older workers might be penalised for making mistakes at work, in situations that could have been readily resolved or avoided through better training and support.[153] A lack of training may push

[143] A156.

[144] A156; UK90.

[145] A3.

[146] A156.

[147] A113; UK78; UK92.

[148] A111.

[149] A99; A103. See also Richard A Posthuma and Michael A Campion, 'Age Stereotypes in the Workplace: Common Stereotypes, Moderators, and Future Research Directions' (2009) 35 Journal of Management 158; Hannah J Swift and others, 'The Risks of Ageism Model: How Ageism and Negative Attitudes toward Age Can Be a Barrier to Active Aging' (2017) 11 Social Issues and Policy Review 195.

[150] A113.

[151] UK88.

[152] UK86; UK88.

[153] A106.

older workers to retire or resign, especially if they feel their skills are not keeping up with organizational change, or if technology is changed abruptly.[154]

Employers also sometimes fail to encourage older workers to make use of policies that might assist them, such as those around flexible working.[155] Indeed, an older worker may not be employed due to a fear of needing to provide flexible working conditions in the future.[156] Equally, an illness or injury that might be tolerated in a younger worker may not be accepted in an older worker: 'It's a whole package of thought around their value to a company.'[157] This reflects the substantial discretion that employers have around how these policies operate in practice.[158]

In some cases, employers avoid having difficult conversations with older workers, or undertaking succession planning, for fear of being seen as 'ageist'.[159] This can lead to age discrimination against younger workers, who are expected to over-perform and are subjected to performance management processes;[160] this can 'create intergenerational stress within teams'.[161] By not having these conversations, employers also miss an opportunity to identify

[154] UK152.

[155] UK88.

[156] A104.

[157] A101.

[158] UK88. See similarly Vanessa Beck and Glynne Williams, 'The (Performance) Management of Retirement and the Limits of Individual Choice' (2015) 29 Work, Employment & Society 267.

[159] UK88; UK89.

[160] UK88.

[161] Ibid.

where issues around performance can be supported and rectified, through both training and flexible work arrangements for those with caring responsibilities.[162]

The performance management of older workers can also raise age-based issues.[163] In some cases, there is a sense that these processes have been driven by age, or manifest some age bias, even if there are also legitimate performance concerns:[164] '[w]ith any discrimination claim, what you find is that there's always mixed elements'.[165] Poor disciplinary processes can be perceived as having an element of age bias, though there is often limited evidence to back this up.[166] That said, often poor processes can be attributable to a breakdown in communication[167] and, in some cases, a failure to accommodate a disability.[168]

Both older and younger workers experience excessive paternalism at work. For younger workers, this could manifest as unhelpful 'mentoring'.[169] For older workers, this manifested – in the particular context of COVID-19 – in being more likely to be furloughed or stood down from work.[170] While employers might see this as helping their workers, it is not necessarily in their best interests, as it limits pay and promotional opportunities.[171]

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[162] Ibid.

[163] A109.

[164] A111; UK117.

[165] A111.

[166] A108.

[167] UK117.

[168] Ibid.

[169] A156.

[170] UK117.

[171] Ibid.

Less benevolently, youth wages can lead to discrimination as workers grow older and become eligible for higher pay rates. As one practitioner noted, 'I had quite a few complaints where … people were saying, "Look, you know, I've suddenly turned this age, and suddenly my shifts have disappeared."'[172] Older workers may also experience pejorative terms and age-based name-calling, including terms like 'cranky old bitch', 'old fart', 'geriatric', or 'dinosaur'.[173]

In relation to termination, older workers could be pushed to leave work,[174] especially when a new manager was appointed,[175] ostensibly on the basis of seeking 'fresh blood',[176] 'fresh ideas'[177] or 'renewal'.[178] Workers often experienced pressure to retire,[179] which could be exerted subtlety or indirectly: '[i]t's just a sense of being pushed out, a sense of being less valued. … a general sense that you are not welcome here anymore.'[180] Older workers – especially older women[181] – might also be targeted in redundancy exercises.[182] Some older workers were subject to non-genuine redundancy situations,[183] where roles and responsibilities

[172] A102. See also A160.

[173] A151.

[174] Ibid.

[175] A100; UK117.

[176] A108; A151.

[177] A154.

[178] Ibid.

[179] A99; A105; A106.

[180] A115.

[181] A100.

[182] A98; A100; A113.

[183] A109.

were moved around, to be undertaken by a different employee.[184] This might be done to make way for a new, more affordable, and often younger staff member.[185] In other cases, older workers are sidelined in workplace restructures due to their age,[186] including by being pushed aside, having managerial responsibilities removed or not being considered for other roles.[187] Older workers experienced subtle coercion to accept voluntary redundancy packages.[188] This is perhaps partly due to older workers' average higher level of seniority: those in more senior positions are more likely to be targeted by voluntary redundancy processes,[189] being more expensive to employ.[190] Indeed, redundancies are only likely to be attractive to older workers with long periods of service.[191] Conversely, in some organizations, those who have failed to achieve a certain level of seniority by a particular age may be seen as ineffective or less effective than their peers, and targeted for redundancy: 'there must be something wrong with you for not having ascended the ladder in that way.'[192] Even if a redundancy is not discriminatory, it can lead to a fear of not regaining work, particularly for older women.[193]

Overall, this discussion reveals some of the striking similarities and parallels between the experiences of age discrimination of different (non-prime) age groups, uniting the experiences

[184] Ibid.

[185] A111.

[186] A101.

[187] A103; A151.

[188] A104.

[189] Ibid.

[190] A111.

[191] A154.

[192] A104.

[193] A108; UK152.

of older and younger workers.[194] Age discrimination remains an enduring problem for both older and younger workers across the life-cycle of employment.

## VI. The Nature of Age Discrimination: Compounding the Difficulties of Enforcement

The nature of age discrimination, and the way it affects the practical enforcement of age discrimination law, is a recurring theme taken up in the chapters that follow. At this stage, however, it is important to make three thematic points.

*First*, the difficulties faced by many older workers in recruitment and at the end of the employment relationship can be partly attributable to the enduring age-norms around retirement,[195] and the idealised view of older age as a period of leisure and recreation. Unfortunately for many workers – especially older women, those with caring responsibilities, and those with limited pensions – this ideal does not reflect their reality.[196] Thus, while societal views of ageing do not match the reality of many older people, they continue to have an enduring influence on how workplaces are structured.

*Second*, in some instances, taken in isolation, age discrimination could be seen as trivial or 'trifling':[197]

[194] Blackham, 'Young Workers' (n 8) 31.

[195] See, eg, Martin Kohli, 'The Institutionalization of the Life Course: Looking Back to Look Ahead' (2007) 4 Research in Human Development 253.

[196] A103.

[197] A150.

> I call them 'cup of tea' cases because people put in a claim and they say, "My boss never made me a cup of tea" and you look at that and you think, "Really? Is this your problem?" But actually, if you think about it and somebody comes into work and says, "Hi. Good morning. Do you want a cup of tea? Hi Susan. I'll get you a coffee" and they go through the whole office and they look straight past you and do that day after day after day… actually that's very distressing.[198]

It can be difficult to articulate, then, why age discrimination is harmful when it appears so trivial when documented.[199] Claimants are aware of this, and it can affect their confidence:

> the question I get asked in training by women more than any other is, am I being over-sensitive, do you think I'm exaggerating this? … when they do voice their concerns, they're shut down, and given the snowflake treatment. And so they're really afraid that they are over-sensitive because that's what they're told all the time.[200]

Claimants may not even recognise behaviour as being discriminatory or use that label to describe their experiences. This is, in part, because age discrimination is not well understood[201] and is normalised and tolerated in society:[202]

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[198] UK78.

[199] A150.

[200] A99. This is arguably a form of gaslighting: see Paige L Sweet, 'The Sociology of Gaslighting' (2019) 84 American Sociological Review 851; Kate Abramson, 'Turning up the Lights on Gaslighting' (2014) 28 Philosophical Perspectives 1.

[201] A151; UK152.

[202] A150.

> they're just not predisposed to think in those terms, especially if it's the kind of indirect discrimination of being ignored, of being invisible, of being not listened to. … I guess it's the frog in the pot thing that it happens gradually over time and they just have come to expect that that's how it is for older women and haven't framed it in those terms of, is this discrimination and is it something I can do something about?[203]

Thus, the degree to which age discrimination is seen as trivial or insignificant is also bound up with enduring age norms, and the degree to which age discrimination is seen as more socially acceptable than other types of discrimination.[204] Age is an important personal characteristic,[205] which is used extensively as a social stratifier: 'we like being able to discriminate on these grounds'.[206] This is given legislative form through the many exceptions to the prohibition of age discrimination.[207] The fact that age discrimination is subtle and socially accepted makes it even more difficult to challenge through legal proceedings.[208]

*Third*, it can be difficult to disaggregate age discrimination from other systemic trends. Age-based vulnerability can be driven by systemic factors, such as the changing nature of work and the workplace,[209] offshoring of manufacturing, outsourcing (including of recruitment),[210]

[203] A99.

[204] UK80.

[205] UK82.

[206] Ibid.

[207] Blackham, 'A Compromised Balance?' (n 111).

[208] A159; UK80.

[209] A6.

[210] A10.

workplace automation,[211] and the growth in insecure and temporary work,[212] which affect different age groups differently.

For example, the most junior workers tend to experience very poor treatment at work, sometimes due to hazing and bullying, sexual harassment, or just poor working conditions and long working hours.[213] Younger workers are also over-exposed to exploitation, wage theft, internships and unpaid work experience.[214] This is a particular problem in hierarchical workplaces[215] and in the context of apprenticeships, where (often young) workers are dependent on a particular employer for training.[216] Younger workers may also be more vulnerable because they tend to occupy industries characterised by insecure work, low unionisation and poor working conditions, such as retail and hospitality.[217]

Similarly, it is difficult to disaggregate potential age discrimination from a lack of experience, or a lack of the *right* experience.[218] In competitive employment markets, experience – or a lack thereof – becomes a key distinguishing factor in recruitment. To be employed, people need the

[211] A102.

[212] A6; A102. Though we need to recognise the diversity of different age groups: for example, some older workers quite like flexible, casual roles and zero-hours contracts if they have a good pension and do not need to work to sustain themselves financially: A104; UK166.

[213] A3; A6; A115; A160; A164.

[214] A6; A105; A112; A159; A160; A169. Blackham, 'Working at the Edges of Legal Protection: Equality Law and Youth Work Experience from a Comparative Perspective' (n 9).

[215] A164.

[216] A107; A115; A160.

[217] A160; A169.

[218] A163.

perfect level and type of experience.[219] Young people may have insufficient experience, and older workers too much. However, employers cannot (and should not) be prevented from seeking recruits with a reasonable level of experience or expertise.

Equally, too, a lack of experience – combined with relative youth – could make young people more vulnerable to exploitation at work, in part because their expectations of the workforce are lower.[220] Some younger workers are still coming to understand what is acceptable behaviour at work.[221] As one practitioner noted, 'the employer assumes, this young person doesn't know their rights … it's their first job, so they should just be lucky to have that job and they can get away with treating them terribly.'[222] Some employers might have a strategic preference for younger workers, who are less experienced and less likely to assert their employment rights.[223] Thus, age interacts with and compounds other forms of vulnerability, and can act as a signifier to unscrupulous employers that a worker is especially vulnerable to exploitation.

Age therefore becomes 'a different category of vulnerability'[224] and overlaps with other forms of vulnerability.[225] This does not fit easily within the statutory framework as 'age discrimination', but there is an element of discrimination in how these workers are treated: the poorest treatment is reserved for the weakest of the cohort, typically those who are young and

[219] Ibid.

[220] A164.

[221] A3.

[222] A108.

[223] A110.

[224] A169.

[225] A112.

the least experienced at work.[226] That said, these cases would rarely be pursued as an age discrimination claim, even if age is a factor.[227]

It may not be practically possible – or necessary – to distinguish between these interlinked factors:[228] issues can have more than one cause, and can be addressed through more than one solution. That said, structural issues can be intensified by age-based law and policy, such as the use of youth wages, which de-value younger workers.[229] Further, these structural trends directly challenge the way age discrimination law is implemented and enforced;[230] with minimal job security, individuals will not risk their job to make a discrimination complaint[231] (Chapter 4). Discrimination law, with its strict division between direct and indirect discrimination, may therefore be inappropriate for capturing the complex ways discrimination manifests in society, and its effects on individuals.[232] How legislation is framed can limit our perception and understanding of discrimination and its effects.[233] Evaluating the degree to which the legislative framework is appropriate for conceiving of, and addressing, age discrimination at work is the key aim of the chapters that follow.

[226] A115; A159; A164.

[227] A108.

[228] A164.

[229] A159; A160.

[230] A154.

[231] A159.

[232] A111.

[233] Ibid.

## VII. Chapter Overview

Age discrimination therefore remains widespread, despite legal reform to make age discrimination at work unlawful. The House of Commons Women and Equalities Committee inquiry on Older People and Employment (WEC OPE inquiry) concluded that 'Ageism remains a significant problem within British society and is affecting the ability of people to continue working into later life, despite long-standing laws against age discrimination.'[234]

The question, then, is why does age discrimination endure? In her oral evidence to inquiry, barrister Dee Masters summed up the issues thus:

> In theory, we have a very robust legal system. We have the Equality Act, which prohibits all forms of age discrimination. The real issue, it seems to me, is one of enforcement. … as a practitioner I very rarely see discrimination claims, and not just on age but in respect of any of the protected characteristics. It is very unusual for people to put their heads above the parapet and bring an age discrimination complaint and hold organisations to account. One of the reasons for this is that discrimination is very rarely overt; it is unusual for an organisation to explicitly say, "We're not giving you this job because, frankly, we think you're past it." Discrimination is often motivated by unconscious stereotypes or prejudices.[235]

[234] Women and Equalities Committee, 'Older People and Employment' (2018) Fourth Report of Session 2017–19, HC 359 13.

[235] House of Commons, 'Oral Evidence: Older People and Employment' (2018) HC 359 Q43 <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2017/older-people-and-employment-17-19/> accessed 23 June 2020.

This book exposes what is going wrong with the enforcement of age discrimination law, across Australia, the UK and Canada. It considers how the limitations of the legal framework are impacting on individual, collective and agency enforcement, and how the system might be improved to better address age discrimination at work. Drawing on six years of empirical research conducted in Australia and the UK, it maps the barriers to claiming across the life-cycle of a dispute, and considers how legal barriers might inhibit our ability achieve an age-diverse workplace. The book offers a critical and nuanced roadmap for the future development of age discrimination law in common law countries. It draws on normative theoretical and empirical legal scholarship to offer a grounded critique of existing age discrimination laws and their enforcement and posits concrete suggestions for legal change and reform. It aims to promote critical dialogue about the success and failures of existing age discrimination laws, and to provide a concrete, empirically grounded path for legal change and renewal. It pursues these goals through three key areas of scholarship.

*First,* in Part 1, drawing on comparative perspectives from the UK, Australia, and Canada, it develops a normative case for preventing age discrimination in employment (Chapter 2). It critically considers how age discrimination law does (and should) affect or influence the lives of older and younger workers, the demographic composition of the workforce, and our capacity to protect vulnerable members of society. The comparative approach adopted offers a critical means of evaluating and illuminating the different practices in common law countries, and builds on the successes of different nations to construct a more developed normative model for the future development of age discrimination law. The common challenges faced by these common law countries – demographic ageing, poor youth employment, and persistent age discrimination – make this comparative analysis particularly relevant.

This theoretical work is grounded in the enduring tensions and ambivalences endemic to age discrimination law.[236] It is these tensions that make age discrimination law unique, and these issues distinct from those arising in other areas of discrimination. Age discrimination is seen as 'different' to, and less harmful than, other forms of discrimination. Unlike many prohibited grounds of discrimination, there is no single group who may benefit from its protection: in the countries under study, age discrimination legislation protects all people and all ages. While age discrimination is undesirable, it is often seen as less undesirable than other forms of discrimination and, indeed, potentially beneficial and efficient in some circumstances, including where ageing is assumed to be associated with declining physical and mental capacity. Age discrimination legislation is therefore caught in a fundamental conflict between its intrinsic and instrumental aims. Unlike other forms of discrimination, age discrimination is less likely to be viewed as a human rights issue: instrumental goals generally take priority. Further, entrenched social and cultural views on age make age discrimination a difficult problem to tackle using legal incentives and sanctions. While research on other forms of discrimination informs this theoretical discussion, it is necessary to consider age discrimination separately, as an issue with its own unique complexities and conceptual controversies.

Part 1 goes on to consider the issue of enforcement of age discrimination law from a theoretical perspective, offering a normative and theoretical critique of the individual enforcement model and its alternatives (Chapter 3). This discussion draws on doctrinal analysis of the law in the UK, Canada and Australia, to frame the empirical results reported in subsequent chapters.

[236] See, eg, Blackham, 'Young Workers' (n 8).

*Second*, in Part 2, building on this theoretical work, and focusing on two empirical mixed method case studies of the enforcement of age discrimination law in the UK and Australia, the book critically examines the key practical challenges and limitations of relying on the individual enforcement model for addressing age discrimination in employment. These case studies feature rigorous doctrinal analysis, content analysis of judicial decisions, qualitative expert interviews, surveys of legal practitioners, and analysis of statistical data from courts, tribunals and statutory agencies. These mixed research methods are integrated to offer an innovative and nuanced critique of the practical enforcement of age discrimination law in each jurisdiction, across the stages of claiming (Chapter 4), negotiation and alternative dispute resolution (ADR) (Chapter 5), and hearing and judgment (Chapter 6). These case studies identify a number of critical limitations for pursuing age discrimination claims in each jurisdiction, including: limited claiming by particular groups, especially younger workers and older women; extensive reliance on confidential ADR to resolve claims; difficulties in proving discrimination; and potential gaps in relation to intersectional or dual discrimination. Overall, the cost of complaining well exceeds any perceived benefit.

*Third*, then, in Part 3, drawing on these empirical findings, and comparative experiences from the UK, Australia and Canada, the book proposes and tests a normative framework for the future development of age discrimination law, with a particular focus on enforcement. This normative evaluation considers the potential to move beyond individual enforcement models for age discrimination law, to instead focus on preventative measures that might reduce ageism in employment. It canvasses options such as positive duties on employers and other bodies (Chapter 7), agency enforcement (Chapter 8), and collective approaches (Chapter 9), critically evaluating both their potential to address the limits of existing laws, and practical measures

that are essential to ensure that such strategies are successful in practice. To be effective, all of these strategies require a renewed focus on and prioritization of age equality.

The book concludes in Chapter 10 with reflections on the key tensions of age discrimination law, both in relation to the prohibition of age discrimination generally, and the practical enforcement of law.

## VIII. Conclusion

In the context of rapid demographic change, this work offers new and innovative insights into the operation of age discrimination laws in common law countries. This research represents the first focused, in-depth study of the legal effectiveness of age discrimination laws from a theoretical and empirical legal perspective, and is the first substantial work to integrate rigorous and detailed comparative doctrinal analysis on age discrimination law with comprehensive empirical data. It offers a normative model for the development of age discrimination law in common law countries, and a new conceptual framework for thinking about age discrimination and equality law.

The focus of this book is, by necessity, limited. It only considers age discrimination at work and how it is addressed. It does not consider broader questions of how we should better reshape the workforce and support services to support older workers,[237] age discrimination beyond the workplace (though discrimination experienced in other areas of public life can strongly

[237] See Women and Equalities Committee, 'Older People and Employment' (n 234); AHRC, 'Willing to Work' (n 14).

influence our behaviour and experience at work),[238] or how we can prompt broader cultural change – including in workplaces – to better value age diversity[239] and improve workplace management and communication,[240] including through flexible work.[241] It does not consider the broader range of policy instruments used to address demographic ageing and improve youth employment.[242] This book, and the evidence within it, offers just one piece of a complex puzzle.

However, while the scope of this work is limited, its findings are relevant not just to age discrimination, but to equality and workplace law more generally: many of these issues are relevant to all protected grounds.[243] The findings and recommendations herein therefore use age as a lens to help us rethink our approach to discrimination law and workplace rights. It is therefore part of a broader and ongoing conversation about we can secure fairness, dignity and wellbeing at work and promote access to justice.

[238] Blackham and Temple (n 119).

[239] Blackham, *Extending Working Life* (n 67).

[240] A98; A99; A151; UK88; UK92; UK117; Alysia Blackham, 'Interrogating the "Dignity" Argument for Mandatory Retirement: An Undignified Development?' (2019) 48 Industrial Law Journal 377.

[241] A99; A151; Alysia Blackham, 'Rethinking Working Time to Support Older Workers' (2015) 31 International Journal of Comparative Labour Law and Industrial Relations 119.

[242] Miriam Hartlapp, 'Deconstructing EU Old Age Policy: Assessing the Potential of Soft OMCs and Hard EU Law' (2012) 16 European integration online papers 1; Blackham, 'Addressing the Ageing Workforce' (n 11); Alysia Blackham, 'Values Driving Ageing Law and Policy in Europe' in Mia Rönnmar and Jenny Julén Votinius (eds), *Festskrift Till Ann Numhauser-Henning* (Juristförlaget i Lund 2017).

[243] A112; A115.