

Submission to the call for contributions on ageism and age discrimination – 2021

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Dear Independent Expert

I write this submission based on data from a multi-year comparative mixed-methods critique of the enforcement of age discrimination law in Australia and the UK, funded by the Australian Research Council (DE170100228, ‘Addressing Age Discrimination in Employment’). This submission synthesises results from:

- Legal doctrinal, and qualitative and quantitative content analysis, of 1208 UK Employment Tribunal (ET) age discrimination decisions, published between February 2017 and 17 April 2019, and 108 Australian age discrimination cases handed down since 1990;
- Semi-structured qualitative expert interviews with 101 respondents from across the UK nations and Australian states and territories, conducted between July 2015 and September 2020, and including experts from equality bodies, legal practice, age lobby groups, government, unions and academia;
- Statistical analysis of data from public surveys, equality bodies and Acas (UK); and
- A survey of 76 legal practitioners in the UK and Australia working on age discrimination matters.

The full results of this project will be published later in 2021,¹ but I provide a summary of the key findings to inform the upcoming report to the Human Rights Council. Full results can be provided on request, and outputs from the project are available at ageworks.info

Forms and manifestations of ageism and age-discrimination

1. What forms does age discrimination affecting older persons take and which ones are the most prevalent? Where available, please provide concrete examples and collected data including in employment, education, social protection, and health, financial and social services.

Focusing on employment specifically, my study has mapped the ways in which age discrimination at work is an enduring and prevalent phenomenon. Despite the introduction of laws making age discrimination unlawful – some of which have been in place for nearly 30 years – there appears to have been little shift in workplace age norms. In this study, expert respondents reported that age discrimination was the biggest issue facing older workers at work (E81). 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’ (A105). Age discrimination was seen by the expert respondents as being subtle and rarely overt (A10, A100, A101, A102, A103, A113, A150, A153, E78, W84, cf E80, E81), and occurring across the life-cycle of employment, from recruitment to termination.

This is consistent with national surveys: Australian survey evidence indicates that age discrimination is widespread in Australian workplaces. In a 2014 prevalence survey of age

¹ Alysia Blackham, *Reinvigorating Age Discrimination Law: Beyond Individual Enforcement* (under contract for publication in 2021, *Oxford Monographs on Labour Law*, Oxford University Press).

discrimination in the workforce, based on telephone interviews with 2,109 Australians aged 50 years and over, the Australian Human Rights Commission (AHRC) found that 27% of respondents reported experiencing age discrimination in employment in the previous two years.² Further, 32% of respondents were aware of other people experiencing discrimination because of their age in the workplace in the last two years.³

Analysing the 2014 General Social Survey (GSS) conducted by the Australian Bureau of Statistics (ABS),⁴ Jeromey 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%).⁵ In relation to age discrimination specifically (Table 1), 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%). Age discrimination was slightly more likely to be reported by women, those born in Australia, those with a disability, heterosexuals and non-parents.

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: Age Discrimination Reported, by Demographic Characteristics (%), 2014, GSS

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 therefore offers high quality evidence of the enduring prevalence of age discrimination in Australian workplaces.

² 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.

³ AHRC (n 2) 23.

⁴ Alysia Blackham and Jeromey Temple, ‘Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework’ (2020) 43 UNSW Law Journal 773.

⁵ Though note the large number of ‘other’, at 48.6%.

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).⁶ Those under 35 were more likely to report experiencing age prejudice (39% of respondents) than those aged 35–54 (22%) or over 55 (20%).⁷ Nearly half of all respondents (46%) who had experienced prejudice had done so in employment or at work.⁸ 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.⁹

3. From an intersectional perspective, are there specific factors that aggravate ageism and age discrimination and how? Please provide concrete examples and collected data where available.

Discrimination on the grounds of age is fundamentally linked to other types of discrimination:¹⁰ there is intersectionality between age and other grounds such as gender, disability, ethnicity, sexuality and social class.¹¹ Jeromey Temple and I have found, using data from the 2014 ABS GSS, that those over 60, women, those with a disability and the Australian-born are more likely to report age discrimination.¹²

For older women, both age and gender influence their experiences.¹³ Women who experience age discrimination tend to see it as ‘bound up’ with discrimination on other grounds – especially gender and race – making it hard to identify instances of age discrimination specifically.¹⁴

The nature of age discrimination can also change as it interacts with other grounds.¹⁵ Age can exacerbate other forms of disadvantage (for example, on the grounds of gender or ethnicity),¹⁶ and age can make people more vulnerable to particular types of wrong.¹⁷ Age is therefore an ‘amplifier’ of other forms of inequality.¹⁸ Age discrimination therefore cannot be seen or interpreted in a vacuum: disadvantage is complex, overlapping and intertwined across multiple grounds, including age.

⁶ Dominic Abrams, Hannah Swift and Diane Houston, ‘Developing a National Barometer of Prejudice and Discrimination in Britain’ (2018) Research Report 119 22, 24.

⁷ *ibid* 25.

⁸ *ibid* 27.

⁹ *ibid* 28.

¹⁰ Malcolm Sargeant, ‘Ageism and Age Discrimination’ in Malcolm Sargeant (ed), *Age Discrimination and Diversity: Multiple Discrimination from an Age Perspective* (Cambridge University Press 2011) 13.

¹¹ Sian Moore, ‘“No Matter What I Did I Would Still End up in the Same Position” Age as a Factor Defining Older Women’s Experience of Labour Market Participation’ (2009) 23 *Work, Employment & Society* 655.

¹² Blackham and Temple (n 4).

¹³ Lynn Roseberry, ‘Multiple Discrimination’ in Malcolm Sargeant (ed), *Age Discrimination and Diversity: Multiple Discrimination from an Age Perspective* (Cambridge University Press 2011) 37.

¹⁴ Moore (n 11) 660.

¹⁵ AHRC, ‘Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability’ (2016) 71–74.

¹⁶ Aileen McColgan, *Discrimination, Equality and the Law* (Hart Publishing 2014) 68.

¹⁷ *ibid* 69.

¹⁸ Women and Equalities Committee, ‘Older People and Employment’ (2018) Fourth Report of Session 2017-19, HC 359 14.

Legal, policy and institutional frameworks related to ageism and age-discrimination

4. What international, regional and national legal instruments are in place to combat ageism and age-discrimination?

6. At the national level, please outline the legal protections available against age discrimination and indicate whether age is explicitly recognised as a ground for discrimination? If so, are there specific areas for which equality is explicitly guaranteed? Are there any areas where differential treatment based on older age is explicitly justified?

National legal protections against age discrimination are in place in the UK and Australia. However, in Northern Ireland, there is limited protection from age discrimination beyond the context of employment.¹⁹

In the UK, age discrimination is regulated by both human rights law and equality law. The Equality Act 2010 (UK), while generally prohibiting direct and indirect age discrimination, allows direct age discrimination to be justified as a proportionate means of achieving a legitimate aim. The UK Supreme Court in *Seldon v Clarkson, Wright and Jakes* [2012] UKSC 16 has summarised the aims that might be pursued as (1) intergenerational fairness and (2) dignity. Both of these aims have been questioned in the academic literature.²⁰ Age discrimination is also regulated by the European Convention on Human Rights (at least in relation to Convention rights).²¹ These provisions have not been used often in practice in relation to age discrimination at work.²²

In Australia, age discrimination at work is regulated by state, territory and federal equality law; and via industrial regulation (at the federal level, the *Fair Work Act 2009* (Cth) (FWA)). It is only possible to pursue a claim in one jurisdiction. The choice of jurisdiction – which is largely up to the claimant – will influence which body receives, conciliates and hears the claim; the specific legal rules to be applied; and the scope for agency enforcement. Australia as a whole does not have a bill of rights or human rights charter; the *Australian Constitution* makes limited provision for individual rights, and does not consider age discrimination. However, Victoria,²³ the Australian Capital Territory (ACT)²⁴ and Queensland²⁵ have adopted human rights instruments, which offer protection from discrimination. That said, enforcement mechanisms under equality law tend to be more straightforward than those under human rights law, and are therefore more commonly used.

7. Do the existing legal protections against age discrimination allow for claims based on intersectional discrimination, that is discrimination which is based on the intersection of age and other characteristics such as race, ethnicity, gender, disability, sexual orientation or other status?

¹⁹ See Alysia Blackham, 'Age Discrimination beyond Employment' (2019) 52 *Kobe University Law Review* 1.

²⁰ Elaine Dewhurst, 'Intergenerational Balance, Mandatory Retirement and Age Discrimination in Europe: How Can the ECJ Better Support National Courts in Finding a Balance between the Generations?' (2013) 50 *Common Market Law Review* 1333; Alysia Blackham, 'Interrogating the "Dignity" Argument for Mandatory Retirement: An Undignified Development?' (2019) 48 *Industrial Law Journal* 377.

²¹ Article 14. See also *Human Rights Act 1998* (UK).

²² Though see the discussion of pensions in Blackham, 'Age Discrimination beyond Employment' (n 19).

²³ Charter of Human Rights and Responsibilities Act 2006 (Vic) s 8(3)–(4).

²⁴ Human Rights Act 2004 (ACT) s 8(3).

²⁵ Human Rights Act 2019 (Qld) s 15.

Existing legal protections in the UK and Australia are fundamentally ill-equipped for dealing with instances of intersectional discrimination.²⁶ As I have explored elsewhere, while intersectional claims are not prohibited by the terms of the statute, there is minimal attempt to explicitly accommodate or integrate intersectional disadvantage or even multiple discrimination in the statutory framework.²⁷ Few cases are run on intersectional grounds, and it is rare for intersectional cases to succeed. This does not reflect how people actually experience discrimination: about 40% of those exposed to discrimination report experiencing multiple discrimination.²⁸

9. Please indicate if there are institutional or complaints mechanism to address inequalities or grievances related to ageism and age discrimination. If so, please provide statistics on cases and types of cases received?

Australia and the UK have grounded their age discrimination laws in an individual rights model, with a primary focus on individual enforcement via complaints for remedying age discrimination.

However, there is some scope – at least in theory – for alternative models of enforcement in these jurisdictions, via statutory agencies, collective action and positive duties. These mechanisms are rarely exercised in practice, however, in part due to the institutional devaluing of age equality.

In Australia and the UK, age discrimination claims relating to employment are first filed with a statutory agency, which attempts confidential conciliation between the parties. In Australia, the vast majority of complaints are resolved via confidential conciliation, and limited data is made public about these complaints.²⁹ Official statistics on age discrimination cases and types of cases received are generally limited in Australia and the UK.

In my research, I have found that those most likely to use legal mechanisms relating to age discrimination to the point of hearing and judgment are older men, in claims relating to dismissal (see Table 2).³⁰ Few age discrimination cases are successful, in either jurisdiction.

Older women are substantially under-represented in the case law; however, they are not so underrepresented in claims presented to statutory agencies. Indeed, in some jurisdictions, age discrimination complaints filed by women exceed those filed by men. Women are more likely to conciliate and/or withdraw their claim over the course of legal proceedings. This implies that complaint mechanisms are likely exacerbating the intersectional nature of age discrimination.

²⁶ Blackham and Temple (n 4).

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ Alysia Blackham and Dominique Allen, ‘Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom’ (2019) 31 *Australian Journal of Labour Law* 253; 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.

³⁰ Alysia Blackham, ‘Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law’ (2020) 42 *Sydney Law Review* 1; Alysia Blackham, ‘Enforcing Rights in Employment Tribunals: Insights from Age Discrimination Claims in a New “Dataset”’ [2021] *Legal Studies* forthcoming.

	Australia (up to 31 December 2017)	UK (February 2017 to 17 April 2019)
Case total	108	1208
<i>Nature</i>		
Substantive	64	244
Procedural	44	162
Withdrawn		804
<i>Substance of claim</i>		
Dismissal	63	165
Recruitment	33	23
<i>Claimant demographics</i>		
Male	81	664
Female	28	573
Too old	99	136
Too young	6	20
Legal representation	53	187
<i>Outcome</i>		
Successful at hearing	12	43
Compensation (median)		GBP 8800

Table 2: Findings from the case sample, UK and Australia

In my research, I therefore argue for a four-fold approach to reform to better address age discrimination: improvements to the individual enforcement model, to reduce barriers to claiming and pursuing rights; greater emphasis on agency enforcement, to reduce the focus on reactive individual claims; stronger collective action around age and age equality; and the use of proactive positive duties on employers to advance age equality.