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Age Discrimination Beyond Employment

Alysia BLACKHAM⁺*

I INTRODUCTION

Population ageing is reshaping the demographic make-up of countries across the Organisation for Economic Co-operation and Development (OECD). Individuals are, on average, living longer, healthier lives. This is both a major success story for the OECD, and a potential challenge for society, as individuals develop different needs into old age.

While older people are increasingly making up a larger proportion of the population, there is still widespread age discrimination in public life. Despite this, most academic research (including my own) has primarily focused on age discrimination in employment,¹ rather than that in other social spheres.² Drawing on comparative experiences in Australia and the UK, this article considers the extent to which the legal framework is capable of addressing age discrimination beyond employment. It considers potential gaps and limits of legal regulation, and puts forward possible reforms to address age discrimination in public life.

II THE CHALLENGE AND OPPORTUNITY OF POPULATION AGEING

As Figure 1 indicates, population ageing is a noticeable trend in the UK, Japan,

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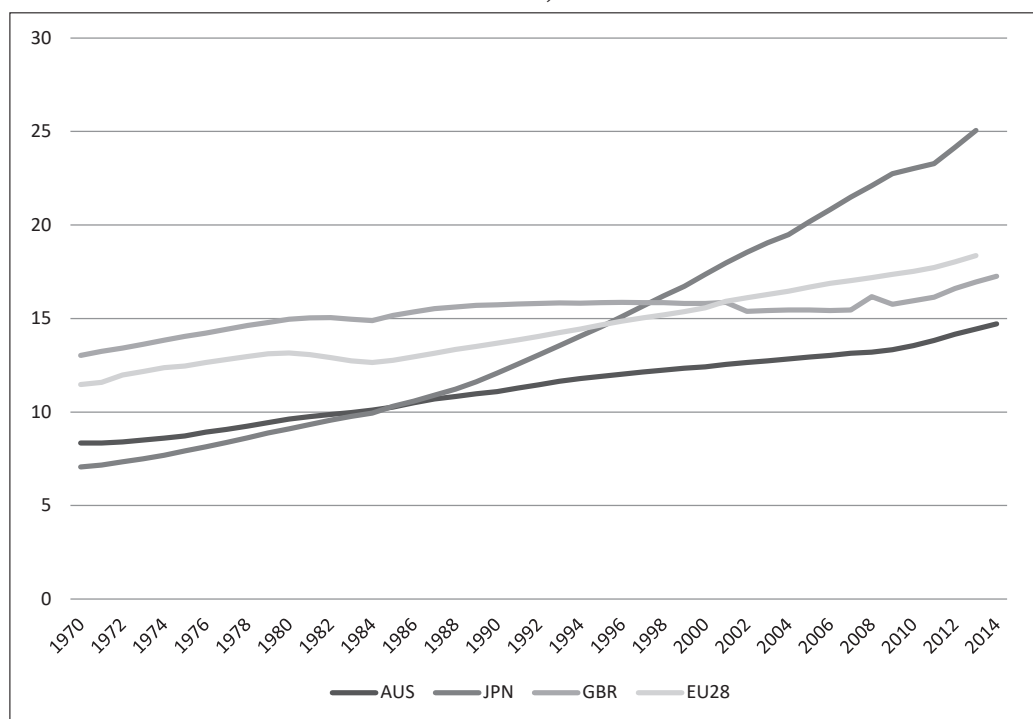
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1 See, for example, Alysia Blackham, *Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice* (Hart Publishing, 2016) (*Extending Working Life for Older Workers*); Alysia Blackham, ‘Defining “Discrimination” in UK and Australian Age Discrimination Law’ (2018) 43(3) *Monash University Law Review* 760 (‘Defining “Discrimination”’); Alysia Blackham, ‘A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK’ (2018) 41(3) *Melbourne University Law Review* 1085 (‘A Compromised Balance?’); Ann Numhauser-Henning and Mia Rönnmar (eds), *Age Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and Beyond* (Kluwer Law International, 2015) (*Age Discrimination and Labour Law*).

2 Though scholarship has considered broader issues of elder law, if not age discrimination: see, for example, the contributions on elder care and health in Ann Numhauser-Henning (ed), *Elder Law: Evolving European Perspectives* (Edward Elgar Publishing, 2017) (*Elder Law*). The noticeable exception to this lies in the contributions to Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart, 2003). These contributions are discussed below.

Australia and across the EU-28. In 2013, those aged 65 and over constituted 14.43 per cent of the population in Australia, 25.05 per cent in Japan, 16.96 per cent in the UK, and 18.37 per cent in the EU-28. Population ageing is likely to continue and escalate as the post-war baby boomer generation ages and medical care continues to improve. For example, in Australia, by 2057 it is projected that those aged 65 and over will constitute 22 per cent of the population; and, by 2097, represent 25 per cent of the population.³ Further, those who are old are getting older: in Australia in 2017, those aged 85 and over represented only 13 per cent of those aged over 65; by 2047, they are projected to represent 20 per cent of older people.⁴ These demographic trends pose both challenges and opportunities for governments, employers, and individuals.

Figure 1: Elderly population (65+) as percentage of the population, 1970-2014, OECD



Source: OECD (2019), *Elderly population (indicator)*. doi: 10.1787/8d805ea1-en (Accessed on 19 July 2019)

3 Australian Institute of Health and Welfare, 'Older Australia at a Glance, Australia's Changing Age & Gender Profile', *Australian Institute of Health and Welfare* (10 September 2018) <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/demographics-of-older-australians/australia-s-changing-age-gender-profile>>.

4 Ibid.

III AGE DISCRIMINATION IN PUBLIC LIFE

While older people are making up a larger proportion of the population, there is still widespread age discrimination in public life. Age discrimination occurs in diverse areas such as: housing and accommodation, health and care, transport, financial services, social security, education, clubs and associations, sport, retail services and hospitality services. Published in 2003, Fredman and Spencer's ground-breaking edited collection on age as an equality issue⁵ contained contributions considering both age discrimination in education,⁶ and health and social care.⁷

In relation to health and social care, as Robinson maps, it can be difficult to know how widespread age discrimination actually is, particularly as many studies on the topic are dated.⁸ Further, there is disagreement about what actually constitutes 'discrimination' in the context of health care: older people on average may receive less benefit from certain interventions; is it then discrimination to deny an intervention to an older person, if this disadvantage is concentrated among older people, and averages are used to justify a denial of individual care?⁹ Can (or should) cost-effectiveness be used to justify a difference in treatment,¹⁰ and should healthcare be 'rationed'?¹¹ Robinson was writing before the introduction of age discrimination legislation in the UK; to some extent, the legislative framework now offers a structure in which to consider these questions. However, more recent studies have still questioned the extent to which age discrimination is present in health care: while older people perceive negative attitudes towards them, this may not be due to age as such, but due to their more complex and 'troublesome' health needs.¹² (This, of course, may be indirect age discrimination.) Other scholars have written convincingly about enduring ageism in health care,¹³ providing evidence that age discrimination is still a widespread societal problem in health and social care.

In education, Schuller identifies a 'huge implicit and systemic bias in favour of

5 Fredman and Spencer (n 2).

6 Tom Schuller, 'Age Equality in Access to Education' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart, 2003) 117.

7 Janice Robinson, 'Age Equality in Health and Social Care' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart, 2003) 97.

8 Ibid 104–105.

9 Ibid 105.

10 Ibid.

11 Ibid. See also Greg Bognar and Iwao Hirose, *The Ethics of Health Care Rationing: An Introduction* (Routledge, 2014) ('*The Ethics of Health Care Rationing*').

12 Angela Kydd and Anne Fleming, 'Ageism and Age Discrimination in Health Care: Fact or Fiction? A Narrative Review of the Literature' (2015) 81(4) *Maturitas* 432 ('Ageism and Age Discrimination in Health Care').

13 Sarah H Kagan and GJ Melendez-Torres, 'Ageism in Nursing' (2015) 23(5) *Journal of Nursing Management* 644; Mark Lawler et al, 'Ageism in Cancer Care' (2014) 348 *BMJ* g1614; Emma Mitford et al, 'Ageism in First Episode Psychosis' (2010) 25(11) *International Journal of Geriatric Psychiatry* 1112; Peter G Lloyd-Sherlock et al, 'Institutional Ageism in Global Health Policy' (2016) 354 *BMJ* i4514. More generally, see Nancy Krieger, 'Discrimination and Health Inequities' (2014) 44(4) *International Journal of Health Services* 643.

youth'.¹⁴ Education poses challenging questions about what age equality might mean in practice, and when inequality might be tolerated or acceptable. Schuller argues, for example, that older people cannot be coerced to participate in education; that exclusion might be acceptable if someone is 'demonstrably unable to benefit from education' or, in the context of publicly funded education, if public investment is 'unlikely to show commensurate returns'; and age equality might be 'trumped' by other equality claims.¹⁵ Thus, while Schuller advocates for a move towards a broader view of education focusing on life-long learning,¹⁶ age equality as such may be difficult to conceive of and achieve in practice.

Statutory equality agencies, which are tasked with addressing discrimination in public life in Australia and the UK, are increasingly recognising that age discrimination in public life is widespread. The Victorian Equal Opportunity and Human Rights Commission, for example, has produced examples of age discrimination in public life on its website:

Declan and Diana go to a restaurant with their two young daughters aged six and eight. The manager tells them that the restaurant does not serve children under the age of 12, because they might disrupt other diners.

A caravan park enforces a rule preventing teenagers from moving around the caravan park after 9pm.

A group of four young people, aged 19 and 21 years of age try to book a cruise with a travel company but are told that their booking will not be accepted because they are not over 21 years of age and want to travel without a legal guardian.¹⁷

While examples are provided of old age discrimination in employment, there are no examples provided of old age discrimination in public life.

By contrast, the Western Australian Equal Opportunity Commission has conducted a state-wide survey of residents aged over 55 to consider how age discrimination impacts upon older people. The survey found that older people felt 'invisible in public life, sense they are unworthy to society and feel disrespected'.¹⁸ Further, respondents

14 Schuller (n 6) 121.

15 Ibid 123.

16 Ibid 143.

17 Victorian Equal Opportunity and Human Rights Commission, 'Age Discrimination', *Victorian Equal Opportunity and Human Rights Commission* <<https://www.humanrightsccommission.vic.gov.au/discrimination/discrimination/types-of-discrimination/age>>.

18 Western Australian Equal Opportunity Commission, 'Age Is Not a Use by Date: A Snapshot of the Experiences of Discrimination among Western Australia's Seniors', *Western Australian Equal Opportunity Commission* (2019) <<http://www.eoc.wa.gov.au/publications/reviews-and-reports/age-is-not-a-use-by-date>> ('*Age Is Not a Use by Date*').

reported that services did not cater for their needs as older people. Comments in the survey in relation to goods and services included:

“Being ignored in queues is common place - there is a tendency to become invisible!”

“[I felt] Ignored by shops and banks in favour of younger clients, [and I was] told to go on the website ‘if you know how’ in a sarcastic manner.”

“Speaking down to me and making me wait for service. Assuming because you are old you have no business acumen.”

“They expect me to be digitally competent and use jargon that I simply can’t understand.”

“When applying for credit card, because I am retired it seems it is assumed I am unable to pay my debts if I want to increase [my] limit.”¹⁹

In relation to housing and accommodation, the survey revealed housing affordability and housing quality to be major concerns for respondents. Seniors’ housing was ‘characterised by unfair, unaffordable and unconscionable monthly rentals, exit fees and housing contracts.’²⁰ Respondent comments included:

“It is an ongoing problem with the owner/managers of our park home village. They are charging us exorbitant fees, refuse to do necessary upgrades to the village, bully the older residents and blatantly refuse to meet and discuss these problems.”

“I am being bullied by my landlord the owners of [name omitted]. Not only myself but all the other residents also.”

“I was told there is a 15 to 20 year wait for the over 55 accommodation.”²¹

In relation to health, some respondents had difficulties when accessing medical care, including in being rushed, not being given time to process information, and not being listened to or consulted in decisions about their care:

“In medical services they think you don’t or might not understand things and judge you are old in mind and nature, stereotyping you.”²²

19 Ibid.

20 Ibid.

21 Ibid.

22 Ibid.

These survey results reveal that age discrimination is prevalent in public life. However, as the Western Australian Equal Opportunity Commission notes in its report, older people can be very vulnerable; in practice, it can be difficult to disaggregate age discrimination from poor treatment designed to exploit people's vulnerability, and people who are in a vulnerable position can struggle to assert their legal rights.²³ This, then, raises substantial challenges in practice for the legal framework.

IV GAPS IN THE LEGAL FRAMEWORK FOR PREVENTING AND ADDRESSING AGE DISCRIMINATION

Perhaps unsurprisingly then, there are few legal complaints relating to age discrimination in public life. Many equality agencies do not publish detailed data regarding the age breakdown of those complaining of age discrimination. However, as part of its *Age is Not a Use by Date* report, the Western Australian Equal Opportunity Commission has provided detailed statistics relating to discrimination claims in that jurisdiction, as depicted in Table 1. This data relates to all grounds of discrimination, not just age discrimination.

Table 1: Discrimination complaints (all grounds) received by area and age, 2017–18

Area	Under 55	%	Over 55	%	Not known	%	Total
Employment	211	55.7	40	55.6	13	61.9	264
Goods, Services, Facilities	92	24.3	16	22.2	7	33.3	115
Education	20	5.3	6	8.3	0	0.0	26
Access to Places and Vehicles	17	4.5	3	4.2	0	0.0	20
Accommodation	34	9.0	2	2.8	1	4.8	37
Clubs	5	1.3	2	2.8	0	0.0	7
Not specified	0	0.0	2	2.8	0	0.0	2
Sport	0	0.0	1	1.4	0	0.0	1
Total	379	100	72	100.0	21	100.0	472
% of all claims by age	80.3		15.3		4.4		

Source: Western Australian Equal Opportunity Commission, *Age is not a use by date: A snapshot of the experiences of discrimination among Western Australia's seniors* (2019)

Table 1 indicates that those aged under 55 (80.3 per cent of all discrimination claims) are far more likely to make a claim of discrimination than those aged over 55 (15.3 per cent of all discrimination claims). Further, claims are far more likely to relate to employment (at around 55 per cent of all discrimination claims) than any other area

²³ Ibid.

of public life. Thus, despite older people reporting that they have experienced age discrimination in the areas of goods and services and accommodation in particular, this is translating to few discrimination complaints, at least in Western Australia.

Table 2 further demonstrates that older people in Western Australia are bringing few discrimination claims, and rarely assert their rights in practice, whether to address age discrimination or any other form of discrimination. As Table 2 shows, the number of age discrimination complaints – in all areas, and across all ages – is very low in any given year. This is perhaps unsurprising, as Western Australia is a comparatively small jurisdiction, with a population of around 2.6 million people. However, this is still likely to demonstrate that few people are raising a complaint when they experience age discrimination in public life.

Table 2: All discrimination complaints received by ground and age, 2017–18

Ground	Under 55	%	Over 55	%	Not known	%	Total
Impairment	91	24.0	27	37.5	7	33.3	125
Age	24	6.3	13	18.1	1	4.8	38
Race	77	20.3	7	9.7	3	14.3	87
Victimisation - Public Interest Disclosure Act	1	0.3	6	8.3	0	0.0	7
Victimisation	35	9.2	5	6.9	1	4.8	41
Sex	28	7.4	4	5.6	2	9.5	34
Family Status	3	0.8	3	4.2	0	0.0	6
Family Responsibility	14	3.7	2	2.8	1	4.8	17
Pregnancy	21	5.5	1	1.4	0	0.0	22
Racial Harassment	13	3.4	1	1.4	0	0.0	14
Sexual Harassment	43	11.3	1	1.4	4	19.0	48
Sexual Orientation	10	2.6	1	1.4	0	0.0	11
Spent Conviction	1	0.3	1	1.4	0	0.0	2
Breastfeeding	1	0.3	0	0.0	0	0.0	1
Gender History	2	0.5	0	0.0	0	0.0	2
Marital Status	5	1.3	0	0.0	0	0.0	5
Political Conviction	1	0.3	0	0.0	1	4.8	2
Publication of Name in Fines Enforcement Registry Website	1	0.3	0	0.0	0	0.0	1
Religious Conviction	8	2.1	0	0.0	1	4.8	9
Total	379	100.0	72	100.0	21	100.0	472
% of all claims by age	80.3		15.3		4.4		

Source: Western Australian Equal Opportunity Commission, *Age is not a use by date: A snapshot of the experiences of discrimination among Western Australia's seniors* (2019)

A The Australian Legal Framework

It is important, then, to consider why there are so few claims of age discrimination relating to public life, and whether there are any issues with the legal framework that might be deterring or limiting claims in this area.

In Australia, age discrimination is prohibited at the federal level by the *Age Discrimination Act 2004* (Cth) and at state and territory level by separate legislation. At the federal level, the Act prohibits age discrimination in relation to:

- access to premises²⁴
- goods, services and facilities²⁵
- disposition of land²⁶
- administration of laws and programmes²⁷
- accommodation²⁸ and
- education.²⁹

While the scope of the *Age Discrimination Act 2004* (Cth) is broad, covering many areas of public life, and prohibiting discrimination on the basis of any age, the statutory framework still struggles to effectively address discrimination in these areas. This is due to four key limitations in the legislative framework.

First, there are extensive exceptions to the statutory prohibition of age discrimination. These exceptions include:

- other laws, as specified in the Act,³⁰ including those relating to:
 - tax³¹
 - social security³²
 - migration³³
 - pensions³⁴
 - superannuation³⁵ and
 - health;³⁶

²⁴ *Age Discrimination Act 2004* (Cth) s 27.

²⁵ Ibid s 28. This section was considered in the case of *Kennedy v Anti-Discrimination Commissioner* [2013] NTCA 8, where it was argued that the claimant was discriminated against when a physiotherapist charged for a letter. It was held that the claim was lacking in substance and misconceived.

²⁶ *Age Discrimination Act 2004* (Cth) s 30.

²⁷ Ibid s 31.

²⁸ Ibid s 29.

²⁹ Ibid s 26. This section has been considered in two cases: *Gupta v State of South Australia* [2014] FCCA 414, which concerned a 4 year old child; and *Banjanin v Department of Education and Communities* [2012] NSWADT 37, where the claimant argued they were discriminated against on the basis of age (58) at TAFE, a technical education provider; it was held the complaint in *Banjanin* was lacking in substance.

³⁰ *Age Discrimination Act 2004* (Cth) s 39.

³¹ Ibid s 40.

³² Ibid s 38.

³³ Ibid s 43.

³⁴ Ibid s 41.

³⁵ Ibid s 38.

³⁶ Ibid s 42.

- health,³⁷ so long as:
 - it is part of an ‘exempted health program’, which is ‘reasonably based on evidence of effectiveness, and on cost’;³⁸ or
 - taking age into account in a health care decision is ‘reasonably based on evidence, and professional knowledge, about the ability of persons of the other person’s age to benefit from the goods or services’;³⁹
- superannuation, insurance and credit,⁴⁰ so long as the discrimination is ‘based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely’, or is reasonable; and⁴¹
- voluntary bodies.⁴²

These exceptions have had wide-ranging implications in the case law. A number of claimants have attempted to circumvent these exceptions; these attempts have all been unsuccessful. Indeed, the vast majority of the case law in Australia at the federal level on age discrimination in public life has revolved around these exceptions, and whether they operate to defeat a claim.⁴³

For example, in relation to social security, in *McLeod and Secretary, Department of Social Services (Social services second review)*⁴⁴ it was held that courts and tribunals cannot consider age discrimination under the *Social Security Act 1991* (Cth): this needs to be taken up with the legislature, not the courts. Similarly, in *Schramm and Secretary, Department of Social Services (Social services second review)*⁴⁵ it was held that pension decisions made by Centrelink, the government social security agency, were excluded from the scope of the Act.

In relation to migration, claims that have been defeated by the relevant exception include *Jaravaza v Minister for Immigration*,⁴⁶ *Moussa v Minister for Immigration*,⁴⁷ and *Khroud v Commonwealth of Australia*.⁴⁸ Taxation claims that have been defeated by the exception include *Harste v Commissioner of Taxation*⁴⁹ and *Coker v Commissioner of Taxation*.⁵⁰ In relation to voluntary bodies, in *Herbert v Five Dock*

37 Ibid s 42.

38 Ibid s 42(1)–(2), 42(6).

39 Ibid s 42(3).

40 Ibid s 37.

41 Ibid s 37(3), (5).

42 Ibid s 36.

43 It is likely that claims at state and territory level have a different focus, especially given migration, social security and income tax are largely regulated at the federal level: see *Australian Constitution* ss 51(ii), (xxiii), (xxiiiA), (xxvii). It is beyond the scope of this paper to consider all state and territory case law.

44 [2016] AATA 853 (28 October 2016).

45 [2016] AATA 102 (25 February 2016).

46 [2013] FCCA 68 (19 April 2013).

47 [2016] FCCA 1248 (1 June 2016).

48 [2016] FCCA 1202 (15 March 2016).

49 [2013] AATA 544 (2 August 2013).

50 [2010] AATA 367 (18 May 2010).

*Dockers RSL Rugby League Football Club*⁵¹ it was held that a rugby club was a voluntary body, and therefore there could be no age discrimination claim for a nine-year-old child.

Overall, then, the broad exceptions in the Australian legal framework operate to endorse and perpetuate age discrimination in public life, including in areas that are likely to operate to substantial individual detriment, such as pensions, social security, migration and health. There is little case law beyond these areas, which may indicate how difficult it is to bring a claim in this area, or how little benefit there is to pursuing legal recourse for age discrimination.

Second, then, reliance on individual enforcement to address age discrimination in public life is a major limitation of the Australian legal framework. There are few claims on the basis of age discrimination generally, and even fewer that relate to the non-employment setting. While equality agencies in Australia have some, limited, powers to assist claimants and conduct inquiries,⁵² these powers have rarely been used in relation to age discrimination in public life. The major burden of enforcement still lies on individuals, who often occupy a vulnerable position and may be unable or unwilling to assert their rights.

Third, and more generally, there remains a general acceptance of age discrimination in public life, which is built into wide-ranging areas of law and government programmes. Age is integral to assessing social security benefits, tax and pensions; finance and insurance; health; and migration. The extensive exceptions that have been built into the law both reflect and perpetuate these social norms, which see age as a reasonable and accepted social stratifier.

Fourth, and building on this, there is an inherent tension in the legal framework between special benefits for certain age groups (such as age-specific accommodation in older people's housing, or discounts for services) and the need to address age discrimination. Relatedly, there is a tension between the need for protection and paternalism for certain age groups, and the need to respect individual autonomy.⁵³ This is particularly evident in relation to health care, where older people may be denied a voice in determining their own health treatment, based on assumptions that they are 'incapable of making decisions on matters affecting their lives'.⁵⁴

51 [2012] NSWADT 110 (6 June 2012).

52 Dominique Allen, 'Barking and Biting : The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311.

53 In relation to young people, see Sandra Fredman and Sarah Spencer, 'Introduction' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart, 2003) 1, 7; Jonathan Herring, 'Children's Rights for Grown-Ups' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart, 2003) 145, 150–4.

54 WA Equal Opportunity Commission (n 18).

B The UK Legal Framework

The question, then, is whether a comparative lens offers a different approach or ways to address some of these limitations. In this Part I consider how age discrimination in public life is addressed in the UK.

In the UK, age discrimination is prohibited under:

- EU law, but in relation to employment only;
- the European Convention on Human Rights; and
- the *Equality Act 2010* (UK).

EU law on age discrimination,⁵⁵ as contained within *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*⁵⁶ relates to employment and occupation only. It does not extend to other areas of public life. While there is a proposed EU Directive to ban discrimination in social protection, education and access to goods and services – *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*⁵⁷ – this has languished for over ten years, with limited progress being made in that period.

This failure to prohibit age discrimination beyond employment at the EU level is having a noticeable impact in the UK, at least in Northern Ireland. While the *Equality Act 2010* (UK) covers England, Scotland and Wales, age discrimination in Northern Ireland is regulated by the *Employment Equality (Age) Regulations (Northern Ireland) 2006* (NI), which only cover employment. Despite attempts to extend the law to cover goods, services and facilities,⁵⁸ the more general difficulties being experienced with devolution in Northern Ireland⁵⁹ mean that legislation to this effect has not been passed. Thus, the limited scope of EU law combined with issues of devolution means that those in Northern Ireland, too, have very limited protection against age discrimination.

Second, age discrimination is prohibited by the European Convention on Human Rights, at least in relation to Convention rights. Article 14 says: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... other status’, including age. Convention rights include the right to peaceful enjoyment of possessions (Protocol 1 article 1) and the right to education (Protocol 1 article 2).⁶⁰

⁵⁵ Which still continues to bind the UK, at least until the Brexit process is complete.

⁵⁶ [2000] OJ L303/16.

⁵⁷ SEC(2008) 2180, SEC(2008) 2181.

⁵⁸ Equality Commission for Northern Ireland, ‘Age Law Reform’, *Equality Commission for Northern Ireland* <<https://www.equalityni.org/Delivering-Equality/Addressing-inequality/Law-reform/Policy-responses>>.

⁵⁹ HC Hansard, 13 February 2019, vol 654, col 905 (Tony Lloyd).

⁶⁰ See also *Human Rights Act 1998* (UK).

Age discrimination in public life has been successfully challenged under the provisions of the European Convention on Human Rights. For example, in *Hunter v Student Awards Agency for Scotland*⁶¹ a challenge to student loans that were limited on the basis of age to those under 55 was successful on the basis of the right to education, being held to not be proportionate. This may be contrasted with the unsuccessful claim in *R (on the application of Douglas) v North Tyneside MBC*,⁶² where it was held that loans did not fall within the scope of the *Human Rights Act 1998* (UK) sch 1 Part II article 2.

In relation to social security, Protocol 1 article 1 does not require that States create a pension scheme, nor does it guarantee a particular pension amount; however, if States do create a pension scheme, they must comply with Article 14.⁶³ Any difference of treatment based on an identifiable status or ground will be 'discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'⁶⁴ However, States have 'a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment'.⁶⁵

In *R (on the application of Reynolds) v Secretary of State for Work and Pensions*⁶⁶ it was held that welfare payments (in this case, jobseeker's allowance and income support) could be a possession for the purposes of Protocol 1 article 1; however, it was also held that age-based payments which disadvantaged those under the age of 25 were justified. In *R (on the application of Harvey) v Haringey LBC*⁶⁷ it was held that the difference of treatment was not actually due to age; rather, the case related to different pension schemes that were in operation at different times. In *British Gurkha Welfare Society v Ministry of Defence*⁶⁸ it was held that the treatment of pensions was justified; and in *R (on the application of Smith) v Secretary of State for Defence*⁶⁹ it was held that a pension rule (that is, that a spouse could only claim a pension under a pension sharing order at the age of 60) was justified. Thus, the ability to justify age-based rules under the European Convention on Human Rights has made it very difficult to challenge social security rules using Article 14.

Third, at the domestic level, age discrimination in public life is regulated by the

61 *Court of Session* (Outer House), 20 May 2016, 2016 S.L.T. 653.

62 [2003] EWCA Civ 1847.

63 *British Gurkha Welfare Society v The United Kingdom* (No 44818/11) [2016] ECHR 755 (15 September 2016), [61].

64 *Ibid* [62].

65 *Ibid* [62].

66 [2002] EWHC 426 (Admin); upheld on appeal to the House of Lords as *R (on the application of Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 (26 May 2005), [2006] 1 AC 173.

67 [2018] EWHC 2871 (Admin).

68 [2010] EWCA Civ 1098; *British Gurkha Welfare Society v The United Kingdom* (No 44818/11) [2016] ECHR 755 (15 September 2016) [88].

69 [2004] EWHC 1797 (Admin), [2005] 1 FLR 97.

Equality Act 2010 (UK). Under the Act, age discrimination is prohibited in:

- services,⁷⁰ including the provision of goods and facilities,⁷¹ and in the exercise of a public function,⁷² but only for those over the age of 18;⁷³
- associations⁷⁴ (but associations can give concessions for people of particular ages);⁷⁵ and
- higher and further education.

In the UK, age discrimination is *not* prohibited in relation to:

- premises⁷⁶
- finance services (which includes a service of a banking, credit, insurance, personal pension, investment or payment nature)⁷⁷
- transport⁷⁸
- primary or secondary schooling⁷⁹
- requirements of an enactment⁸⁰
- sport age-bands⁸¹
- immigration⁸²
- concessions⁸³
- age-based holidays⁸⁴
- age-restricted services (such as the sale of weapons and alcohol)⁸⁵
- residential mobile homes⁸⁶
- additional exclusions made by the Minister⁸⁷ and
- under charitable instruments, for a proportionate means of achieving a legitimate aim.⁸⁸

The prohibition of age discrimination in the UK is therefore far narrower than that in Australia. Further, even in areas in which age discrimination is prohibited, age discrimination can be justified. Direct age discrimination can be justified where it is a proportionate means of achieving a legitimate aim.⁸⁹ Indirect age discrimination can

70 *Equality Act 2010* (UK) s 29.

71 *Ibid* s 31(2).

72 *Ibid* s 31(3).

73 *Ibid* s 28.

74 *Ibid* pt 7.

75 *Ibid* sch 16, 1A.

76 *Ibid* s 32.

77 *Ibid* sch 3, 20(A).

78 *Ibid* pt 12.

79 *Ibid* s 84, sch 3(9).

80 *Ibid* s 191, sch 22, 1(1).

81 *Ibid* s 195.

82 *Ibid* sch 3, 15A(1).

83 *Ibid* sch 3, 30A.

84 *Ibid* sch 3, 30B.

85 *Ibid* sch 3, 30C.

86 *Ibid* sch 3, 30D.

87 *Ibid* s 197.

88 *Ibid* s 193.

89 *Ibid* s 13(2).

also be justified if it is a proportionate means of achieving a legitimate aim.⁹⁰

Thus, the UK legislative framework also faces substantial issues in protecting against age discrimination in public life. First, unlike in Australia, the scope of the prohibition of age discrimination is very narrow, meaning there is minimal protection from age discrimination in relation to accommodation, financial services, and transport.⁹¹ Further, the exercise of the functions of Parliament, and Ministers making instruments under an enactment, are excluded from the prohibition of discrimination in services.⁹² This may prevent welfare payments and old age pensions from falling within the scope of the *Equality Act 2010* (UK).⁹³

Second, like in Australia, there are substantial exceptions to the prohibition of age discrimination, including in relation to the requirements of an enactment. Again, this has significant potential to undercut protection from age discrimination.

Third, even where age discrimination is prohibited, and does not fall within an exception, both direct and indirect age discrimination can be justified. This means, then, for example, that age discrimination in the provision of a health service could be justified as a proportionate means of achieving a legitimate aim. This could seriously limit statutory protection in practice.

Fourth, there are few examples of individuals enforcing their rights to be protected from age discrimination in public life under the *Equality Act 2010* (UK). This may reflect the limited scope of the legislative framework, and the extensive exceptions to protection. However, it may also reflect the difficulties of enforcing these provisions. Claims beyond employment cannot be pursued in the Employment Tribunals; instead, they must be advanced in the civil courts. This can mean that pursuing a claim is more expensive, time consuming and difficult than pursuing a similar claim in relation to employment. Further, claims relating to public life do not have access to conciliation via the Advisory, Conciliation and Arbitration Service (Acas), which offers free conciliation for claims relating to employment. This may make the early resolution of non-employment age discrimination claims more difficult.

Overall, then, it appears that challenging age discrimination in public life in the UK is highly dependent on the European Convention on Human Rights, at least in practice, and most claims have been pursued via this route. The UK may continue to be bound by the European Convention on Human Rights, even after the Brexit process, meaning that this could continue to be the preferred route for pursuing

90 Ibid s 19.

91 Unless it can be argued as falling within the scope of the European Convention on Human Rights.

92 *Equality Act 2010* (UK) sch 3, s 2.

93 Having been determined, for example, by the *Pensions Act 2007* (UK), *Pensions Act 2011* (UK), *Pensions Act 2014* (UK).

claims.⁹⁴ However, the vast majority of claims to date have failed on the basis that the discrimination is justified, raising questions as to the effectiveness of even this option for addressing age discrimination.

V DISCUSSION

Overall, then, despite survey evidence of age discrimination in public life, it appears that enforcement of legislative protections against age discrimination in areas beyond employment is difficult. This may reflect the limited scope of protection in the UK, extensive exceptions in both jurisdictions, and the cost and difficulty of enforcing the law.

The question, then, is what can be done to improve current protections in the legislative framework? First, it is important to review how age discrimination law is enforced. Relying on individuals to enforce their rights is unlikely to be effective in this area: the time, cost and difficulty of pursuing legal mechanisms is likely to form a formidable barrier for many claimants. Thus, it is unlikely that age discrimination in public life will be challenged if reliance is placed on individuals pursuing claims in this area. This may mean, then, that there is a need for additional powers and funding for equality agencies, to conduct inquiries and pursue strategic cases in this area.⁹⁵ Alternatively, there may be a need for quality conciliation in the UK, to resolve claims early and affordably. However, despite the presence of conciliation in Australia, there are still few claims in this area. This reflects the broader need for non-individualised mechanisms for identifying and challenging age discrimination and, ultimately, enforcing the law.

Second, and more generally, there is a need to review age-based treatment in government programmes and policies, particularly those that relate to immigration, pensions, health care, accommodation and other services. In both jurisdictions, extensive exceptions to the legislative framework mean that it is nearly impossible to successfully challenge age discrimination embedded in government programmes. However, using age-based criteria in government activities can send powerful negative messages about the value of people of different ages, and the limited importance of age equality. At a symbolic level, it is important to reevaluate the reliance on age as a criterion for different government benefits and services, drawing on up-to-date evidence that dispels many age-based stereotypes. While this sort of review cannot be prompted using age discrimination law, as most programmes fall beyond the scope of the law, or within an exception, this is an important reform to

94 However, how this might develop in the future is uncertain: see Dimitrios Giannouloupoloulos, 'Human Rights with a (Brexit) Use-by Date', *UK in a changing Europe* (1 February 2019) <<https://ukandeu.ac.uk/human-rights-with-a-brexite-use-by-date/>>.

95 See, for example, Allen (n 51).

pursue for its normative and symbolic impact.

Third, and finally then, it is important to consider whether there should be duties on service providers and others to address age inequality and promote age equality. In particular, this could involve obligations to gather data regarding who uses the services in question, and to evaluate and monitor the age impact of particular programmes. Similar obligations are in place for the public sector in the UK, via the public sector equality duty. Under s 149 of the *Equality Act 2010* (UK), a public authority or person exercising public functions ‘must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

By contrast, positive duties have not typically been a feature of Australian equality law. While the effectiveness of the public sector equality duty has been questioned,⁹⁶ to better address age discrimination in public life it may be necessary to extend these duties to the private sector and to promote their adoption across Australia.

VI CONCLUSION

It is clear, then, that age discrimination is common in public life. As it stands, the legal framework has not been successful at preventing or addressing age discrimination beyond employment. This may be due to a number of overlapping issues, including the limited scope of coverage of age discrimination law (particularly in the UK and EU); the broad exceptions to age discrimination law (in the UK and Australia) and the ability to justify age discrimination (in the UK); the limited enforcement of age discrimination law, with few individual claims, limited agency powers and budgets (in Australia and the UK); and a general societal and governmental acceptance of age discrimination in public life. There are, however,

⁹⁶ See, for example, Sandra Fredman, ‘Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty’ (2014) 43(3) *Industrial Law Journal* 349 (‘Addressing Disparate Impact’); Sandra Fredman, ‘The Public Sector Equality Duty’ (2011) 40(4) *Industrial Law Journal* 405; Sandra Fredman, ‘Breaking the Mold: Equality as a Proactive Duty’ (2012) 60 *American Journal of Comparative Law* 265 (‘Breaking the Mold’); Government Equalities Office, *Review of the Public Sector Equality Duty: Report of the Independent Steering Group* (6 September 2013); Simonetta Manfredi, Lucy Vickers and Kate Clayton-Hathway, ‘The Public Sector Equality Duty: Enforcing Equality Rights Through Second-Generation Regulation’ (2018) 47(3) *Industrial Law Journal* 365 (‘The Public Sector Equality Duty’).

things that can be done, including by reviewing the powers and budgets of agencies to pursue instances of systemic age discrimination in public life; reviewing the use of age in government programmes; and by extending the scope of positive duties. Overall, then, the current legislative framework has substantial limitations, but there is considerable scope for improvement. Demographic ageing may eventually force the hands of governments to make this a priority for reform.