

External assessment 2024

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Stimulus book

# Legal Studies

## General instruction

- Work in this book will not be marked.

## **Stimulus 1**

### **Excerpt from a United Nations General Assembly report, 2021**

In 2009, the Committee on Economic, Social and Cultural Rights concluded that age is a prohibited ground of discrimination under the International Covenant on Economic, Social and Cultural Rights in several contexts.

...

States must ensure that protection from discrimination on the basis of age receives the same standard of scrutiny as other forms of discrimination. Anti-discrimination laws can only be effective if they contain a wide definition of discrimination that includes direct, indirect and structural discrimination, and denial of reasonable [adjustment/s]. ... Anti-discrimination legislation must avoid exceptions, exemptions or justifications that mask ageist biases that limit ... [people's] ability to participate in society on an equal basis with others [because of their age]. Anti-discrimination laws must include effective legal remedies and redress.

## **Stimulus 2**

### **Excerpt from an Australian Human Rights Commission report, 2011**

The aim of the [Age Discrimination] Act [2004] is to act as a catalyst for attitudinal change and to provide individuals with an avenue to make complaints of discrimination. A primary purpose of the Act is to raise awareness that people of all ages have the same fundamental rights to equality before the law regardless of age and to eliminate unlawful age discrimination within our community.

...

It protects against age discrimination in certain areas of public life (for example in employment) and covers both direct and indirect discrimination. ... Different kinds of permanent exemptions exist within the Act, for example in respect of youth wages; positive discrimination; charities; religious bodies; voluntary bodies; ... direct compliance with laws, orders etc.; taxation laws; pensions, allowances and benefits etc.

...

The Age Discrimination Act [2004] provides individuals with the right to make a complaint of unlawful age discrimination. A key function of the Australian Human Rights Commission is to investigate complaints of discrimination. Complaints made to the Commission are subject to a process of conciliation where, with the assistance of an impartial person, people attempt to settle the matter on their own terms.

...

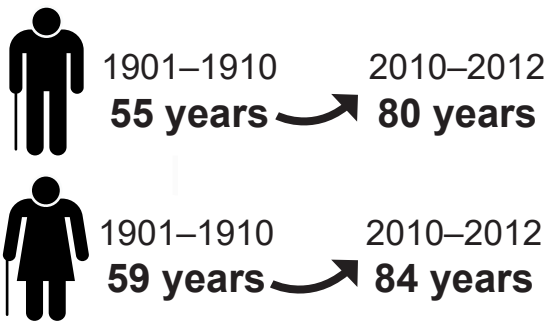
Of the complaints people have made under the Act, the majority of complaints were in the area of employment (an average of 69.2% of Age Discrimination Act complaints between 2004/05 and 2009/10). Of these the majority of complaints related to discrimination in employment on the basis of being 'too old'.

## Stimulus 3

Excerpts from an infographic in an Australian Human Rights Commission report, 2014

# Older Australians

Australians enjoy one of the **highest life expectancies** in the world

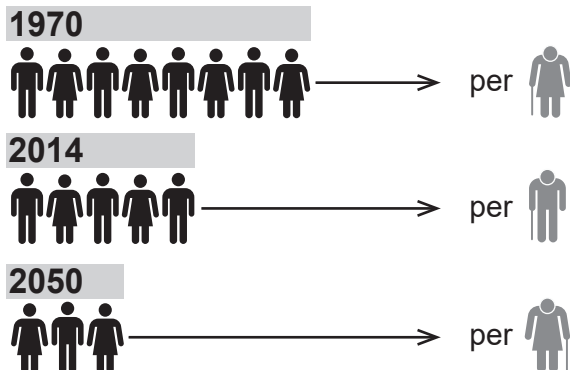


By **2050**, around **one quarter** of Australians will be aged **65 years and over**



## Declining workforce ratio

Number of workers to support → Australians aged 65 years and over



# 1 in 5

Australians aged 55 years or over claim that age is a major barrier to finding or getting more hours of paid work



More than **1 in 4** older Australians live in poverty

People aged **65 years and over** make up **7%** of the homeless population



# 80%

of all Australians aged 65 years and over rely on the age pension

# 3 in 4

people aged 85 years or over live in private dwellings



## Stimulus 4

### Excerpt from a book chapter, 2008

Being a rights-based model, the Australian [discrimination] laws are designed to eliminate discrimination by placing a prohibition on certain conduct and then, in the event of transgression, giving the victim a right to take legal action against the perpetrator. ... [The] key limitations of the model are:

- **The standard is limited to a general and negative or proscriptive duty.** The generality provides flexibility but creates compliance uncertainty, and the proscriptive nature of the duty means the system is fault-based, requiring employer action *only* in the event of transgression having been proven and thus only after the occurrence of wrongdoing.
- **There is no enforcement agency.** The enforcement of compliance is limited to victims as no power is given to the administering agency or other public prosecutor to investigate possible breaches, take action against apparent perpetrators, or even support individual claimants in their actions.
- **The sanctions are limited to individual compensation.** The orders that can be made against perpetrators are limited to orders for compensation or redress, not punishment or, more importantly, preventative or corrective orders.
- **The enforcement process is largely private.** Commencing with compulsory, confidential conciliation, beyond which few claims proceed, the process mostly keeps breaches out of public view which limits both the educative and deterrent effect of claims.

## Stimulus 5

### Excerpt from an Australian Human Rights Commission report, 2021

There are vicarious liability provisions that mean that organisations can be held liable for not acting sufficiently to address discrimination and harassment, but they only come into operation when an incident of discrimination has occurred, and a complaint is made to the Commission.

...

Associate Professor Dominique Allen observed that

anti-discrimination laws impose very few obligations on employers and service providers to address inequality or to anticipate the discriminatory consequences of their behaviour; they do not have to do anything until a successful claim has been made against them and even in that instance, they are most likely to be ordered to pay compensation rather than to make wider, structural change.

## Stimulus 6

### Excerpt from a journal article, 2017

Enforcement is the domain of the individual(s) subject to the alleged discriminatory treatment, who must initiate the process through a complaint and must shoulder the responsibility of [pursuing] the claim and the risk of an adverse costs order should they be unsuccessful in litigating the claim. The capacity of most federal, state and territory human rights agencies is restricted to investigating the circumstances surrounding a complaint and seeking to resolve the complaint by conciliation. Few such agencies have the authority to initiate complaints on behalf of individuals or to provide legal advice or support. In comparison to other Australian regulatory agencies, human rights agencies also have a limited array of enforcement mechanisms at their disposal, as their authority does not extend to functions such as auditing procedures, imposing sanctions such as infringement notices, or requiring enforceable undertakings.

## Stimulus 7

### Excerpt from a law journal article, 2018

In Australia, the prohibition of age discrimination in employment is subject to a ‘significant number of exceptions’. In the second reading speech for the *ADA* [*Age Discrimination Act 2004* (Cth)], it was explicitly noted that ‘[a]ll anti-discrimination laws must strike the right balance between prohibiting unfair discrimination and allowing legitimate differential treatment.’ ... These ‘legitimate distinctions’ spanned a wide range of areas, including superannuation, tax, health, social security and migration, on the basis that ‘[a]ge differences in these areas are based on distinct and broadly accepted social policy rationales’.

...

In 2012, the Australian Commonwealth government released an exposure draft of a consolidated anti-discrimination law (‘2012 Draft Bill’), which would have unified the various equality statutes at the federal level. While there still would have been separate equality and labour law statutes, as well as statutes at the federal, state, and territory level, the 2012 Draft Bill would have provided greater uniformity and simplicity in the federal equality structure. ... Most of the exceptions in the *ADA* would have been retained ... However, the Bill [which lapsed with a change of government] also included a requirement that the exceptions be reviewed within three years ...

## **Stimulus 8**

### **Excerpt from an online article, 29 November 2023**

Alex Gutierrez worked for MUR Shipping and its predecessors for nearly 30 years. But in 2018 he was told, in line with company policy, it was time to set a retirement date.

Gutierrez was moved to a fixed-term contract, asked to train his replacement and ultimately resigned from his job. He then complained to the Australian Human Rights Commission and brought his claim to court, alleging age discrimination.

He won the case but he also lost.

The court found the company had discriminated. But Gutierrez's damages — A\$20 000 — dwarfed his legal costs, which amounted to about \$150 000. The low damages meant Gutierrez might have to pay MUR's costs, as the damages were lower than a previous settlement offer.

Gutierrez was the first person to win an age discrimination case in court in the roughly 20 years the federal Age Discrimination Act 2004 has existed and his situation explains why. You can win in court but still be hugely out of pocket for your costs and your employer's costs. Few people take the risk.

...

Fortunately, Gutierrez had his appeal upheld; his damages were increased to \$232 215, so he was no longer liable for the other side's costs, and he had his appeal costs paid. But not every claim under the current law will be so lucky.

## **Stimulus 9**

### **Excerpt from the Victorian Equal Opportunity and Human Rights Commission website, 2020**

Under the Equal Opportunity Act [1995 (Vic)], employers have a positive duty to eliminate discrimination, sexual harassment and victimisation as far as possible.

Victoria is unique in having a positive duty, which creates an opportunity to prevent unlawful behaviour. It helps organisations put a healthy workplace culture in place ...

To ensure they are complying with the positive duty, organisations should also put measures in place to ensure that complaints are responded to swiftly and appropriately when they do arise.

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# References

## Stimulus 1

Mahler, C 2021, *Report of the Independent Expert on the Enjoyment of All Human Rights of Older Persons*, UN Doc. No. A/HRC/48/53, United Nations General Assembly, [www.undocs.org/A/HRC/48/53](http://www.undocs.org/A/HRC/48/53).

## Stimulus 2

Australian Human Rights Commission 2011, *The Road So Far – the Age Discrimination Act 2004 (Cth)*, AHRC, Sydney, <https://humanrights.gov.au/our-work/publications/road-so-far-age-discrimination-act-2004-cth-2011>. CC BY 4.0.

## Stimulus 3

Adapted from Australian Human Rights Commission 2014, *Face the Facts: Older Australians*. 2014, AHRC, Sydney, <https://humanrights.gov.au/our-work/education/face-facts-older-australians>. CC BY 3.0.

## Stimulus 4

Smith, B 2008, 'Australian anti-discrimination laws – framework, developments and issues' in H Nakakubo & T Araki (eds), *New Developments in Employment Discrimination Law, Kluwer Law International, The Netherlands*, pp. 115–146. The Netherlands: Wolters Kluwer Law & Business (Kluwer Law International). [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1101909](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101909). Used with permission.

## Stimulus 5

Excerpt from Australian Human Rights Commission 2021, *Free and Equal: A reform agenda for federal discrimination laws*, AHRC, Sydney, <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>. Licensed CC BY 4.0.

## Stimulus 6

MacDermott, T 2017, 'Giving a voice to age discrimination complainants in federal proceedings', *FlinLaw Journal*, vol. 19, no. 2, pp. 233–261, available at <http://classic.austlii.edu.au/au/journals/FlinLawJl/2017/9.pdf>. Used with permission.

## Stimulus 7

Blackham, A 2018, 'A compromised balance? A comparative examination of exceptions to age discrimination law in Australia and the UK', *Melbourne University Law Review*, vol. 41, no. 3, pp. 1085–1120, [https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0004/2771500/04-Blackham.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0004/2771500/04-Blackham.pdf).

## Stimulus 8

Excerpt from Blackham, A 2023, 'It can be hard to challenge workplace discrimination but the government's new bill should make it easier', *The Conversation*, 29 November, <https://theconversation.com/it-can-be-hard-to-challenge-workplace-discrimination-but-the-governments-new-bill-should-make-it-easier-218359>. Licensed CC BY-ND

## Stimulus 9

Excerpt from 'Age Discrimination 2020', *Victorian Equal Opportunity and Human Rights Commission*, [www.humanrights.vic.gov.au/for-individuals/age/#Age-discrimination-at-work](http://www.humanrights.vic.gov.au/for-individuals/age/#Age-discrimination-at-work). Licensed CC BY 4.0.



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